Petition

81-426

No.

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FOREMOST INTERNATIONAL TOURS, INC.,
Petitioner,

v.

QANTAS AIRWAYS LIMITED
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALEXANDER ANOLIK, ESQ.
Counsel for Petitioner
Foremost International Tours, Inc.
693 Sutter Street, Sixth Floor
San Francisco, California 94102
(415) 673-3333

Of Counsel:

MITCHELL BLUMENTHAL, ESQ.

ACME LEGAL • 1229 WAIMANU ST. • HONOLULU, HAWAII 96814

QUESTION PRESENTED

The question presented is:

Whether a regulated foreign air carrier, operating under authority granted by the Civil Aeronautics Board, under §402 of the Federal Aviation Act of 1958, may use its market power and government insulated revenues in receiving antitrust immunity under §414 of the Federal Aviation Act, to enter the unregulated independent tour wholesaler market and force a former sponsored tour wholesaler out of the relevant market by virtue of its incipient dominant market position?

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*Foremost International Tours is no longer in business.

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APPENDIX C - Foremost International Tours, Inc. v. *Qantas Airways, Limited*, 478 F.Supp. 589 (D.Hawaii 1979).

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OPINIONS BELOW

A petition for rehearing en banc was timely filed on April 23, 1981, and by Order dated June 3, 1981, the Ninth Circuit Court of Appeals denied the petition. The Ninth Circuit affirmed the findings of the District Court on April 13, 1981. This opinion has yet to be officially reported.

The opinion of the District Court is officially reported at 478 F.Supp. 589 (D.Hawaii 1979).

The following cases were concerned with the issue of primary jurisdiction, which issue is not present in this Petition. The opinion of the Supreme Court, denying certiorari for Qantas, is officially reported at 429 U.S. 816 (1976).

The opinion of the Court of Appeals is officially reported at 525 F.2d 281 (9th Cir. 1975).

The opinion of the District Court is officially reported at 379 F.Supp. 88 (D.Hawaii 1974).

JURISDICTION

A timely Petition for Rehearing was denied and a timely Suggestion for a Rehearing en banc was rejected by the Court of Appeals Order entered June 3, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

ISSUES PRESENTED

Foremost International Tours, Inc., was an independent tour wholesaler who packaged certain inclusive air tours to the South Pacific.

Qantas, who was once a sponsor of the aforementioned inclusive air tour decided, in late 1973, to package its own inclusive air tours to the South Pacific and stopped sponsoring Foremost's inclusive air tours on March 31, 1974.

Foremost then brought an action for injunctive relief and damages claiming that Qantas had engaged in certain anticompetitive practices.

Since these anticompetitive practices fell within the regulatory jurisdiction of the Civil Aeronautics Board, the District Court found that they were within the "initial" jurisdiction of the Civil Aeronautics Board (CAB) under §411 of the Federal Aviation Act.

In 1974, the District Court of Hawaii granted a preliminary injunction. In 1975, the Ninth Circuit Court of Appeals affirmed the District Court's order. This Court denied Qantas' Petition for Writ of Certiorari, 429 U.S. 816.

The District Court of Hawaii, in 1979, found that plaintiff, Foremost International Tours, Inc., had not established predatory conduct or other anticompetitive practices. The Ninth Circuit affirmed this judgment on April 13, 1981. Foremost International Tours timely filed a petition for rehearing en banc and the Court of Appeals of the Ninth Circuit denied the petition on June 3, 1981.

A. The Civil Aeronautics Board's pervasive regulation of the airline industry does not exempt specific anticompetitive practices from the scope of the antitrust laws.

This Court in *Cantor* v. *Detroit Edison Co.*, 428 U.S.

579 (1976), dealt with a situation similar to the case at issue. In *Cantor*, this Court was faced with the issue of antitrust liability for a private utility, pervasively regulated by the Michigan Public Service Commission. The utility furnished light bulbs to its residential customers without additional charges. This marketing practice was approved by the Commission. Cantor, a retail druggist selling light bulbs, brought suit alleging that the utility was using its monopoly power in the distribution of electricity to restrain competition in the sale of light bulbs in violation of the Sherman Act. This Court held that where a regulatory authority pervasively regulates an industry, and has given its approval to a marketing practice which has a substantial impact on an otherwise unregulated business, that industry will not be immune from the application of the antitrust laws. *Id.*, at 581.

Similarly, this Court in *Silver* v. *N.Y. Stock Exchange*, 373 U.S. 341, 357 (1963), stated that,

> Repeal (of the antitrust laws) is to be regarded as implied only if necessary to make the (Securities Exchange) Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.

Moreover, in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), this Court dealt with an electric utility company which refused to sell electricity to municipal power companies when its franchise expired. This Court stated that repeal of the antitrust laws by implication from a regulatory statute is strongly disfavored, and has only been found in cases

of plain repugnancy between the antitrust and regulatory provisions. Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws. *See Mt. Hood Stage, Inc.* v. *Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *cert. den.*, 101 S.Ct. 99 (1981), *Oahu Gas Service Inc.* v. *Pacific Resource*, 460 F.Supp. 1359 (D.Hawaii 1978).

In *International Telephone and Telegraph Co.* v. *General Telephone and Electronics Corp.*, 449 F.Supp. 1158 (D.Hawaii, 1978), G.T.E., by acquiring certain equipment manufacturers, and by developing, effecting, and enforcing an in-house purchasing policy, was found to have violated Section §1 of the Sherman Act. ITT's position was that GTE, "acting in concert with its subsidiaries," adopted an in-house purchasing policy which, wholly apart from its acquisitions, produced an actual trade restraint in violation of Sherman Act 1 in foreclosing ITT from the market. The Court stated that, consonant with the notion that antitrust immunity is bestowed grudgingly, and then just to the minimum extent necessary, exclusive administrative jurisdiction, if it is favored at all, will not *ipso facto* work a blanket exemption for the relevant industry, but will rather apply to the particular and distinct activities and circumstances deemed to have been intended by Congress. Even if one were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a state or an administrative agency, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area. *Cantor, supra*, at 595.

In this case, Qantas principally operates in an industry pervasively regulated by the CAB. It obtained CAB approval to enter the land tour package industry. As was the case with the utility in *Cantor*, *supra*, Qantas had inherent market dominance, and, through the predatory practice of selling its land tour packages below cost, foreclosed any meaningful competition from Petitioner. "There is no logical inconsistency between such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activities in competitive areas of the economy." *Id.*, at 596. Foremost International Tours, Inc., as an unregulated entity, could not effectively compete with Qantas in this setting, since Foremost did not derive airfare revenue to subsidize any proposed below cost selling of its land tour packages; rather, the land tour package was Foremost's sole source of revenue.

Similarly, in *Otter Tail Power Co.* v. *United States*, *supra*, this Court held that, "Use of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of §2 of the Sherman Act." *Id.*, at 377. Otter Tail argued that it refused to supply power to municipal corporations in order to stay in business. This Court responded that the Sherman Act assumed that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail's theory collided with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power, *Id.*, at 382. An analogous situation exists in this case.

This Court, in *Walker Process Equipment, Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965), stated in dicta,

> To establish monopolization or attempt to monopolize a part of trade or commerce under Section 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal (patent) claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure (Food Machinery's) ability to lessen or destroy competition.

The Court, in *Oetiker* v. *Jurid Werke*, 556 F.2d 1 (D.C.C.1977), asked itself whether the dicta in *Walker Process* required proof of market power in an attempt to monopolize. The District Court in that case dismissed the petitioner's antitrust claim under Federal Rules of Civil Procedure 12(b) (6) and the Court of Appeals affirmed (335 F.2d 315 (7th Cir. 1964)). This case reached the Supreme Court after only the initial pleadings were entered at the District Court level. The Supreme Court reversed only as to the patent issue, *Id.*, at 6. Moreover, in *Walker*, this Court stated:

> As respondent points out, petitioner has not clearly articulated its claim. It appears to be based on a concept of *per se* illegality under §2 of the Sherman Act. But in these circumstances, the issue is premature. As the Court summarized in *White Motor Co.* v. *U.S.*, 372 U.S. 253 (1963), the area of *per se* illegality is carefully limited. We are reluctant to extend it on the bare pleadings and absent examination of market effect

> and economic consequences. Thus *Walker* has been read not as a decision defining the elements of a §2 case, but as an opinion deferring such a decision until the proper vehicle arrived.

This language was similarly adopted by the District of Columbia Circuit in the *Oetiker* (*supra*) decision, 556 F.2d, at 6.

The prevailing view which requires a definition of the relevant market and defendant's control of it is to insure that one may distinguish between an illegal intent to monopolize and a lawful intent to compete. On the other hand, if this view were adopted, a gap would appear in the coverage of the antitrust laws—i.e., types of single firm behavior that are anticompetitive, as in the case at bar, would not be subject to federal restraint. *Id.*, at 8. It should be noted that the Court of Appeals for the District of Columbia in *Oetiker* (*supra*) abstained from choosing between two different alternatives proffered by the Ninth and Third Circuits, and, in effect, invited the Supreme Court to resolve this issue. In *General Communications Engineering, Inc.* v. *Motorola Communications and Electronics*, 421 F.Supp. 274 (N.D.Cal. 1976), the Court again in essence asked the Supreme Court to reconcile the conflicting views as to whether a defendant's control of the relevant market must be demonstrated. *Id.*, Note 23, at 284. Moreover, in 1970, the Ninth Circuit view was reaffirmed despite Supreme Court dictum in *Walker*, in *Industrial Building Materials* v. *Interchemical Corp.*, 437 F.2d 1336 (9th Circuit 1970), which stated, "That in an attempt to monopolize situation, only intent to monopolize is in issue and no proof as to relevant market is required." *Id.*, at 1344.

In *U.S.* v. *Braniff Airways, Inc.*, 453 F.Supp. 724 (W.D.Tex. 1978), the Court stated that, for an antitrust court to rule that conduct charged as violative of the antitrust laws is expressly immunized under §414 of the Federal Aviation Act, it must find 1) that the conduct charged was approved by a specific order of the CAB or was clearly contemplated by such an order *and* 2) that the CAB monitored and supervised the conduct complained of. This standard, however, was modified in a revised §414 under the terms of both the Airline Deregulation Act of 1978 and the International Air Transportation Competition Act of 1979.

While the facts in the case at bar evidence a Board order, there are no facts which indicate any monitoring by it. Also, "In no event could the CAB have exposed the predatory conduct alleged which had as its dominant purpose the elimination of a competitor." *Id.*, at 728. In *Big Bear Cartage, Inc.* v. *Air Cargo, Inc.*, 419 F.Supp. 982 (N.D.Ill. 1976), the Court stated, "The FAA does not immunize the air transportation industry from all antitrust liability. Absent an unequivocal expression of Congressional intent the courts have traditionally been reluctant to find a complete repeal of the antitrust laws." *Id.*, at 986. Moreover, "The legislative history of the FAA . . . suggests that Congress gave the Board specific statutory responsibility over competition and monopoly in only one market, that of commercial air transportation." *Id.*, at 988.

In *T.V. Signal* v. *American Telephone and Telegraph*, 617 F.2d 1302, 1305 (8th Cir. 1980), the Court stated that it is well recognized that even a

profitable business may sustain damage to its property or business by reason of illegal restraints of trade. The Sherman Act does not require a plaintiff to retain possession of a business oppressed by an antitrust violation until the business is bankrupted or directly shut down by a violator. More importantly, at Footnote 5, the Court cited numerous cases that have granted standing and eventual monetary damage recovery to a Plaintiff who continued to make a profit, in spite of being the object of an antitrust violation. Petitioner here has already stated that it is no longer in business.

B. Section 414 of the Federal Aviation Act of 1958 does not displace jurisdiction under Sections 1 and 2 of the Sherman Act in this instance.

In *Big Bear Cartage, Inc.* v. *Air Cargo, Inc.*, 419 F.Supp. 982 (N.D.Ill. 1976), various airlines entered into an agreement between local cartage carriers, whereby authority was delegated to an airline wholly-owned corporation, which had the full authority and discretion to provide necessary airfreight services at various airports. The Civil Aeronautics Board approved the delegation of authority to this wholly-owned airline entity, and the Board approval immunized the wholly-owned corporation from antitrust liability for its refusal to contract with the plaintiff, a motor carrier desirous of sub-contracting for airfreight services.

The Court established that it is a well-recognized principle of law that the Federal Aviation Act does not immunize the air transportation industry from all antitrust liability. Absent an unequivocal expres-

sion of Congressional intent, the courts have been traditionally reluctant to find a complete repeal of the antitrust laws. (*Pan American World Airways* v. *U.S.*, 371 U.S. 296 (1963).) The Court held that the actions immunized must be specifically contemplated by the Board order in question. The Court reiterated that it is a basic tenet of law that implied repeals of the antitrust laws are strongly disfavored. (*Far East Conference* v. *U.S.*, 342 U.S. 570 (1952), and *U.S. Navigation Company, Inc.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932).) In sum, unless a course of action or authority immunized by the Board under §414 of the 1958 Federal Aviation Act is specifically contemplated by the order in question, or, in light of these aforementioned cases, the course of conduct is "debatedly approved," by the course of action attacked, no antitrust immunity would attach.

Several cases have held that a course of conduct granted antitrust immunity may be "arguably lawful," or arguably approved, absent a specific Board order on point. The Board may either refuse to explicity assert jurisdiction over a specific matter, or implicitly grant approval by silence concerning an agreement in question. In this vein, a lack of filing of an agreement before the Board may indicate implied antitrust immunity (*Carnation Co.* v. *Pacific Conference*, 383 U.S.213 (1966).

Prior to October 1978, all intercarrier agreements filed with the Board pursuant to Section 412 of the Federal Aviation Act received automatic antitrust immunity pursuant to Section 414 of the Act, provided that the agreements in question were deemed not to be 'adverse to the public interest'. The 1978 Deregula-

tion Act changed this standard, whereby agreements filed pursuant to Section 412 no longer would receive automatic antitrust immunity; rather, a Board grant of antitrust immunity would now be discretionary. However, by virtue of intense pressure from IATA (International Air Transport Association, of which Qantas is a member) member carriers, and their respective governments, the International Air Transportation Competition Act of 1979 reverted to the standard in existence prior to the passage of the 1978 Deregulation Act as applied to international carriers, i.e., IATA member carriers may file cooperative agreements with the Board and, if approved, they would receive automatic antitrust protection. This protection is limited in scope, however, to those transactions both 'specifically approved' by the Board and 'necessarily contemplated' by such Board order granting the antitrust immunity. It should be further noted that the courts have narrowly construed carrier actions performed under an antitrust exemption.

In June of 1978, the Board instituted what is known as a "Show Cause Proceeding" against IATA and its member carriers. The Board made a preliminary finding that IATA no longer need be a beneficiary of full antitrust immunity. Apparently, the Board felt that IATA member carriers could compete equally with their American counterparts, and did not need United States Government protection. As a result, practically all of the U.S. carriers withdrew from IATA's tariff coordination functions, and the same carriers remained reluctant to stay within IATA's technical conferences. However, the General Counsel for the Civil Aeronautics Board has recently stated (November 1980) that carriers involved in

IATA tariff coordination functions were still immune from prosecution pending completion of the Show Cause Proceedings, and at this point there is no legal bar to U.S. carrier participation in IATA tariff coordination. It remains to be seen whether or not the U.S. trunk carriers will rejoin IATA in the near future.

In December 1979 the Board issued a preliminary order in the Show Cause Proceedings, stating which practices would likely receive antitrust protection in the future. This initial order was deliberately vague, so as not to incur the wrath of foreign governments whose airlines are government-controlled and owned, and who see IATA as the only viable organization able to coordinate an efficient and safe international aviation transport system. A Final Order was issued in May, 1981, whereby the Board proposed to strip the International Air Transport Association of a large part of its previously unchallenged antitrust immunity. (Order 81-5-27, May 6, 1981.)

Prior to the Airline Deregulation Act of 1978, §§412 and 414 read as follows:

> §1382. Pooling and other agreements; filing; approval by Board
>
> (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other

air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.
Pub.L.85-726; Title IV, §412, Aug. 23, 1958, 72 Stat. 770.

§1384 Legal Restraints

Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations

of the 'antitrust laws', as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

Pub.L.85-726, Title IV, §414, Aug. 23, 1958, 72 Stat. 770.

The Deregulation Act of 1978, and the International Air Transportation Competition Act of 1979 changed these statutes to read as follows:

§1382. Pooling and other agreements.

Filing and approval of agreements

(a) (1) Any air carrier or foreign air carrier may file with the Board a true copy, or, if oral, a true and complete memorandum, of any contract or agreement (whether enforceable to provisions for liquidated damages, penalties, bonds, or otherwise), or a request for authority to discuss possible cooperative working arrangements in force on October 24, 1978, or thereafter entered into, or any modification or cancellation thereof, between such air carrier or foreign air carrier and any other air carrier, foreign air carrier, or other carrier.

(2) (A) The Board shall by order disapprove any contract, agreement, or request filed pursuant to paragraph (1) of this subsection, whether or not previously approved by it, that it finds to be adverse to the public interest or in violation of this chapter, and shall by order approve any contract agreement, or request, or any

modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter, except that—

(i) the Board may not approve or, after periodic review, continue its approval of any such contract, agreement, or request, or any modification or cancellation thereof, which substantially reduces or eliminates competition, unless it finds that the contract, agreement, or request, is necessary to meet a serious transportation need or to secure important public benefits, including international comity or foreign policy considerations, and it does not find that such need can be met or such benefits can be secured by reasonably available alternative means having materially less anticompetitive effects.

(ii) the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it; and

(iii) the Board may not approve any such contract or agreement, affecting interstate or overseas air transportation, or any modification or cancellation thereof, that limits the level of capacity among air carriers in markets in which they compete, that fixes rates, fares, or charges between or among air carriers (except for joint rates, fares, or charges).

(B) In any proceeding before the Board involving the application of the standards set forth in subparagraph (A)(1) of this paragraph, the party opposing the proposed contract, agreement, or request shall have the burden of proving the reduction or elimination of competition, and the availability of alternative means having less anticompetitive effects, and the party defending the proposed contract, agreement, or request shall have the burden of proving transportation need or public benefits.

(C) The findings required by subparagraph (A)(1) of this paragraph, shall be included in any order of the Board approving or disapproving any contract or agreement, or any memorandum of any contract or agreement, or any modification or cancellation thereof, or any request.

Proceedings upon filing

(b) Upon the filing of any contract or agreement, or any modification or cancellation thereof, or any request for authority to discuss possible cooperative working arrangements, pursuant to subsection (a) of this section, the Board, in accordance with regulations which it prescribes, shall provide to the Attorney General, the Secretary of State, and the Secretary of Transportation written notice of, and an opportunity to submit written comments on, the filed document. The Board may, upon its own initiative or if requested by the Attorney General or either Secretary, hold a hearing, in accordance with regulations prescribed by the Board, to de-

termine if a contract or agreement, or request for discussion authority, whether or not previously approved, is consistent with the provisions of this chapter.

Mutual aid agreements

(c)(1) Notwithstanding any other provision of law, any mutual aid agreement between air carriers which was approved by the Board before October 24, 1978, and which is in effect on October 24, 1978, shall be deemed disapproved and not in effect on and after October 24, 1978.

(2) No air carrier shall enter into any mutual aid agreement with any other air carrier, unless such air carrier files a true copy of such agreement with the Board and the Board approves such agreement pursuant to the provisions of this section. Notwithstanding subsection (c) of this section, the Board shall not approve any such agreement unless such agreement provides (A) that any air carrier will not receive payments for any period which exceed 60 per centum of the direct operating expenses during such period, (B) that benefits under the agreement are not payable for more than eight weeks during any labor strike, and that such benefits may not be for losses incurred during the first thirty days of any labor strike, and (C) that any party to such agreement will agree to submit the issues causing any labor strike to binding arbitration pursuant to the Railway Labor Act if the striking employees request such binding arbitration.

(3) For purposes of this subsection, the term

(A) 'mutual aid agreement' means any contract or agreement between air carriers which provides that any such air carrier will receive payments from the other air carriers which are parties to such contract or agreement for any period during which such air carrier is not engaging in air transportation, or is providing reduced levels of service in air transportation, due to a labor strike; and

(B) 'direct operating expenses' includes interest expenses but does not include depreciation or amortization expenses.

As amended Pub.L. 95-504, §§28(a)(2), (b), (c), 29(a), Oct. 24, 1978, 92 Stat. 1729, 1730; Pub.L. 96-192, §11, Feb. 15, 1980, 94 Stat. 39.

§1384. Antitrust exemption.

In any order made under section 1378, 1379, or 1382 of this title, the Board may, as part of such order, exempt any person affected by such order from the operations of the 'antitrust laws' set forth in subsection (a) of section 12 of Title 15 to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest. Notwithstanding the preceding sentence, on the basis of the findings required by subsection (a)(2)(A)(i) of section 1382 of this title, the Board shall, as part of any order under such section which approves any contract, agreement, or re-

> quest or any modification or cancellation thereof, exempt any person affected by such order from the operations of the 'anti-trust laws' set forth in subsection (a) of section 12 of Title 15 to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and with those transactions necessarily contemplated by such order.
> As amended Pub.L. 95-504, §30(a), Oct. 24, 1978, 92 Stat. 1731; Pub.L. 96-192, §27, Feb. 15, 1980, 94 Stat. 47.

In *Cain* v. *Air Cargo Inc.*, 599 F.2d 316 (9th Cir. 1979), a pre-deregulation case involved a similar setting to the *Big Bear* factual situation. Allegations were made that the corporation which provided ground freight services to and from the airport caused a trucking company to acquire its chief competitor through the award of its CAB-approved contract to provide such service; the CAB's approval of the contract with the corporation would not immunize the corporation from such activity if the allegations were proven, according to the Court's holding.

The Ninth Circuit stated that immunity of regulated activities from the antitrust laws depends on Congressional intent; the inclusion of an express statutory exemption implies that conduct not covered by the statute remains subject to the antitrust laws. The precise exemption must have been necessary in order to make the regulatory act work, and even then, only to the minimum extent necessary. The Court held that summary judgment was improper under §414 of the Federal Aviation Act and allowed the Plaintiffs access to the discovery process.

In *Breen Air Freight, Limited* v. *Air Cargo, Inc.*, 470 F.2d 767 (2nd Cir. 1972), *cert. den.*, 411 U.S. 932 (1973), the Court held that when the airfreight service contractor refused to renew the plaintiff's contract, it amounted to a unilateral refusal to deal, outside the scope of regulated activities. In this setting, the Court held Air Cargo, Inc. was not acting as an agent of the airlines under the guise of acquiring an organization and operating it as a new cartage firm. Plaintiff alleged that a concerted refusal to deal was involved in this predereglation case, and all agreements affecting air transportation *must* (emphasis in original) be filed prior to their implementation, and, once approved, automatic antitrust immunity would attach. Since Air Cargo, Inc. was a subsidiary of all the airlines, no authority apparently was needed for them to act on behalf of all the airlines.

Again, the amended language of §§412 and 414 comes to the forefront here, as the same type of activity alleged as being unlawful by petitioner against Qantas throughout this litigation has become specifically addressed by the Board by the "specifically approved" and "necessarily contemplated" language of the amended §414. (49 U.S.C.A. §1384 as amended, 1978 and 1980.)

In *Scroggins* v. *Air Cargo, Inc.*, 534 F.2d 1124 (5th Cir. 1976), the Court held that the activities attacked as anticompetitive were clearly within the contemplation of prior CAB orders, and they were not adverse to the public interest. The Court held that the Board must have, of necessity, specifically considered the effects upon future competition and the CAB

retained active supervisory jurisdiction to correct anticompetitive elements as they arose, citing the pre-deregulation language embodied in Sections 412 and 414.

The Court held that the conduct alleged in the Complaint was immunized from antitrust liability because a) the actions complained of were within the contemplation of prior CAB Orders which specifically considered effects upon future competition (Federal Aviation Act §415), and b) the CAB has retained an active role of supervisory jurisdiction to correct anticompetitive developments as they arose. However, the Court noted that this so-called supervisory power may not precisely fit within the regulatory scheme and not be within the Board's jurisdictional scope of authority, citing the initial *Foremost* decision, 379 F.Supp. 88 (D.Hawaii 1974).

In *United Airlines, Inc.* v. *Civil Aeronautics Board, Etc.*, 569 F.2d 640 (D.C.C. 1977), the Court held that the powers of the CAB are not so narrow that it lacks all authority to regulate perceived dangers from uncontrolled diversification by air carriers, citing numerous provisions of the Federal Aviation Act of 1958. The Court further held that it may rely upon a combination of sections of the Federal Aviation Act in regulating actions of air carriers and their affiliates in order to protect the financial integrity of the carriers so as to foster sound economic conditions in the air transportation industry.

The Court noted that the diversification attempt by United Airlines, Braniff International, and Flying Tiger Lines, Inc., offered some advantage to the air carriers, but also posed significant hazards. There

were, to be sure, inherent potential dangers in this attempt at forming holding companies and becoming conglomerates for these air carriers, although, nevertheless, these matters must be appropriately regulated.

The Court held, contrary to the carriers' defense, that the attempts to diversify were not merely "paper transactions," as in the situation where Qantas' competitive machinery was already in place when the carrier allowed the Foremost contract to expire. In this context, as in the Foremost case on March 31, 1974, the allegations in the Foremost Complaint contained something more than a "paper transaction" to transfer control from the airlines to a subsidiary, and once a carrier formed an in-house inclusive tour operation, dual responsibilities become apparent that may not always mesh to serve the best interests of the airline and the travelling public.

The holding in this case is not important for present purposes, *per se*, since it was overturned on appeal. However, the procedural issues involved are not applicable to the situation in which Foremost found itself on March 31, 1974 only because, in the United Airlines setting, the Court held that the Board unfairly discriminated against only three carriers, and refused to apply the scope of its regulatory authority to all carriers similarly situated. However, the Court left undisturbed the Board's adoption of the findings of the Administrative Law Judge, cited at 569 F.2d 653, as follows:

> The Board, in its consolidated Orders 75-10-65 & 75-10-66, . . . directed most of its attention to 'The Effects of Diversification' in general . . . However, it also identified 'three primary

> grounds' for applying its innovative regulatory program only to the three air carriers that transferred control to carrier-created holding companies. First, the Board noted that in a carrier-formed holding company organization, management decisions are shifted to the holding company management from that of the air carrier, accounting procedures based on the holding company obscure the financial condition of the air carrier, and the relative importance of the air carrier to holding company management declines as other holdings increase. Moreover, the assets of the air carrier, which constitute most of the assets of the holding company, are needed to finance continued diversification by the holding company. Second, the Board concluded that the application of the regulatory plan only to those three carriers would 'not detrimentally affect their operating authority or competitive position.' Third, it stated that the hearing record, which was primarily concerned with carrier-formed holding companies, 'justifies the limitation of these regulations to those carriers which have pursued this distinguishable course of diversification.' The Board also noted that the scope of its regulatory plan was expansible as experience was gained with the regulation of this limited class.

Moreover, *National Small Shipments Traffic Conference, Inc.* v. *Civil Aeronautics Board*, 618 F.2d 819 (D.C.C. 1980), was one of the first cases explicitly dealing with the post Airline Deregulation Act setting. The Court noted that for over forty years, under the Federal Aviation Act (49 U.S.C.A., 1301 et seq.), and its predecessor, the Civil Aeronautics

Act of 1938 (52 Stat. 977), the industry was subjected to a system of detailed economic regulation which the District of Columbia Circuit had characterized in similar settings as severely anticompetitive.

Prior to the passage of the Airline Deregulation Act of 1978, no carrier acquisition could be obtained without prior Board approval under §408 of the 1958 Federal Aviation Act; moreover, under the former Section 412 of the Act, all intercarrier agreements must have been filed with the CAB. All transactions approved by the Board under former §§ 408 and 412 were automatically exempted from the application of the antitrust laws.

The Court noted the differences in the pre- and post-deregulation standards regarding §§412 and 414 revisions, which provided that carriers *may* file agreements for Board approval, and the Board *may*, if it approves the agreement, relieve the parties to the agreement from all antitrust liability upon a finding that such immunity was "required in the public interest" (P.L.95-104, §§28(a) and 30(a), emphasis supplied.)

In *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488 (9th Cir. 1977), the Court stated that failure to establish that I.B.M. had monopoly power in the sales market was not a legal bar to holding that I.B.M. violated the Act by using exclusionary sales tactics to maintain its monopoly power in the lease market. The Court held that the Sherman Act would be violated if I.B.M. had monopoly power in the sales market and used that power to foreclose competition, gain a competitive advantage, or destroy a competitor in the lease market.

In addition, if proof of an economic market, technically defined, and proof of a dangerous probability of monopolization of such a market were made essential elements of an attempt to monopolize, as a practical matter, the attempt offense would cease to have independent significance. For example, a single firm that did not control something close to fifty percent (50%) of the entire market would be free to indulge in any activity, however unreasonable, predatory, destructive of competition, and without legitimate business justification. Any concern not dangerously close to monopoly power could deliberately destroy its competitors with impunity, which allegation has permeated this litigation, as advanced by Petitioner since 1974.

More specifically, there is support in the decisions and legislative history of the Act for the conclusion that §2 of the Sherman Act was intended to prohibit unreasonable restraints of trade that exclude competition even when they are imposed by a single trader. *Id.*, at 505.

C. A conflict has developed between the Ninth and Third Circuits which should be resolved by this Court, concerning an important aspect of the interpretation of the antitrust laws.

In examining the instant case, Qantas clearly was a solidly entrenched airline in the relevant market. When it went into the inclusive tour wholesale market, it had many resources which enabled it to take advantage of its dominant market position. "Otherwise lawful practices that unnecessarily excluded competition could be actionable under §2 when used by the dominant firm in the industry. The District

Court's findings are insufficient for us to determine whether the §2 claim was properly rejected, because they fail to take into account the dominant position of Clorox in various markets." *See Purex Corporation* v. *Proctor & Gamble*, 596 F.2d 881, 890 (9th Cir. 1979).

Moreover, in *Gough* v. *Rossmoor Co.*, 585 F.2d 351, 390 (9th Cir. 1978), the Court stated: "While conduct which would, in the case of a conspiracy, amount to a *per se* violation of Section 1, constitute an unreasonable restraint of trade without proof of market power, under the rule of reason, market definition is required to establish a §1 violation. Thus, in the absence of proof of relevant market and market power, plaintiff must prove either *predatory* conduct or a *per se* violation of §1 to prove attempt to monopolize. When an attempt to monopolize is charged, it is not necessary to estimate market power on the part of the would-be monopolist as is required when the claim is that of monopolization has actually been achieved and accordingly 'when the charge is attempt to monopolize rather than monopolization, relevant market is *not* in issue.'" This theory, as advanced by Petitioner, was rejected by the District Court of Hawaii in the instant case. (District Court of Hawaii No. 74-116, October 17, 1979, Conclusions of Law Number 29.) The Ninth Circuit stated this finding was not "clearly erroneous."

In *Sherman* v. *British Leyland Motors, Ltd.*, 601 F.2d 429, 453 (9th Cir. 1979), the Court stated in Footnote 47 that:

> Direct evidence of specific intent to control prices or destroy competition is not indispensible when

> the claim is 'Founded upon a substantial claim of restraint of trade' — i.e., a §1 violation, in these circumstances the requisite specific intent may be inferred. Market power is relevant to determining whether such inference is proper but where a §1 violation 'clearly exists' proof of market power is unnecessary to support an inference of specific intent. Even though the restraint effected may be reasonable under §1, it may constitute an attempt to monopolize forbidden by §1 if a specific intent to monopolize is shown. In attempted monopolization, as with monopolization itself, individual conduct may be measured against the same 'reasonableness' standard governing concerted and contractual activity under §1. The requirement that there be a demonstration that a defendant's specific intent to control prices or destroy competition has a 'dangerous probability of success' may be satisfied either by direct proof of market power or by inference from proven specific interest.

Moreover, in *Moore* v. *Jas. H. Matthews & Co.*, 550 F.2d 1207, 1214 (9th Cir. 1977), the Court laid down the rule for the Ninth Circuit as follows:

> The necessary proof can be inferred from either specific intent coupled with monopoly power *or* from proof of specific intent to set prices or exclude competition accompanied by predatory conduct directed to accomplishing the unlawful purpose. In addition, even in the absence of empirical proof of market shares, requisite monopoly power can also be demonstrated by evidence of the exercise of actual control over prices or exclusion of competitors.

It should be noted that in the case at bar, Foremost International Tours is no longer a viable business entity, due to the predatory conduct of Qantas. Even though the findings of fact of the District Court state that Foremost International's profit increased by 200% in the first year of competition with Qantas, it is readily apparent that this finding has proven to be a quite myopic view of the situation. (District Court of Hawaii, No. 74-116, October 17, 1979, Findings of Fact Number 20.)

The Third Circuit, in *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338, 1348 n. 17 (3rd Cir. 1975), specifically declined to follow the rule laid down by the Ninth Circuit which stated that a court may find a §1 violation without first determining the share of the relevant market. *See also Columbia Metal Etc.* v. *Kaiser Alum., Etc.*, 579 F.2d 20, 30 (3rd Cir. 1978). The Rules of this Court, Rule 17.1(a), state, in part, "... When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter," then a review on writ of certiorari should be considered. Petitioner respectfully requests that this Court grant certiorari according to the Rules of the Court, Rule 17.1(a), in order to resolve this important conflict between the Third and Ninth Circuits.

Moreover, in *Edward J. Sweeney & Sons, Inc.* v. *Texaco*, 637 F.2d 105 (3rd Cir. 1980), the conflict between the Third and Ninth Circuits was further demonstrated. In *Sweeney*, the Court noted that,

> (t)he theory of Ninth Circuit cases cited by (the plaintiff) to support its argument ... was rejected by this Court in *Coleman Motor Co.* v. *Chrysler Corp.*... *Coleman* expressly held that definition

> of the relevant market was critical in §2 attempt cases, specifically repudiating the Ninth Circuit view that it is possible to find an attempt to monopolize without such proof.
> *Id.*, at 117. (Citations omitted..)

See also Robert's Waikiki U-Drive v. *Budget Rent-A-Car*, 491 F.Supp. 1199, 1219 (n.17) (D.Hawaii 1980), in which the Court was "puzzled" by the Ninth Circuit's rulings on this issue.

CONCLUSION

For the reason hereinabove stated, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, as prayed for herein.

ALEXANDER ANOLIK, ESQ.
ALEXANDER ANOLIK,
A Professional Law Corporation
Counsel for Petitioner
Foremost International Tours, Inc.
693 Sutter Street,
Sixth Floor
San Francisco, CA 94102
(415) 673-3333

Dated: August 6, 1981
San Francisco, California

Of Counsel,
Mitchell Blumenthal, Esq.

PROOF OF SERVICE

I, the undersigned, declare that I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within entitled cause; my business address is 693 Sutter Street, Sixth Floor, San Francisco, California 94102.

On August 6, 1981, I served the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on the parties involved in said cause, by placing a true copy theerof enclosed in a sealed envelop with postage thereon fully paid, in the United States mail at San Francisco, California, addressed as follows:

George N. Tompkins, Esq.
Condon & Forsyth
1251 Avenue of the Americas
New York, New York 10020

Mukai, Ichiki, Raffetto & MacMilian
Suite 800
The Queen Street Building
345 Queen Street
Honolulu, Hawaii 96813

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of August, 1981, at San Francisco, California.

.....
(signature)

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
For The Ninth Circuit

FOREMORST INTERNATIONAL TOURS, INC.
Plaintiff-Appelllant

vs.

QANTAS AIRWAYS LIMITED,
Defendant-Appellee.

No. 79-4764
79-4425

ORDER

Before: PREGERSON and NORRIS, Circuit Judges, and HANSON, District Judge.*

The panel as constituted above has voted to deny the petition for rehearing and Judges Pregerson and Norris have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix B

UNITED STATES COURT OF APPEALS
For The Ninth Circuit

FOREMORST INTERNATIONAL TOURS, INC.
Plaintiff-Appelllant

vs.

QANTAS AIRWAYS LIMITED,
Defendant-Appellee.

Nos. 79-4764, 79-4425

D.C. No. 74-116

MEMORANDUM

Appeal from the United States District Court
for the District of Hawaii
Jesse W. Curtis, *District Judge*, Presiding
Argued and Submitted March 11, 1981

Before: PREGERSON and NORRIS, Circuit Judges, and HANSON, District Judge.*

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*The Honorable William C. Hanson, Senior United States District Judge for the District of Iowa, sitting by designation.

Foremost International Tours, Inc. (Foremost) assembles and wholesales "inclusive" tour packages, comprising round-trip airline fare and local land accommodations, to retail travel agents. From 1969 to 1973, Qantas Airways Limited (Qantas) sponsored Foremost's tours from North America to Australia and New Zealand. In April 1973, Qantas terminated its sponsorship of Foremost's tours and entered the market on its own. Alleging harm by Qantas's conduct, Foremost brought this action for violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, seeking monetary damages and injunctive relief under sections 4 and 16 of the Clayton Act. 15 U.S.C. §§ 15 and 26. Specifically, Foremost alleges that Qantas monopolized, attempted to monopolize, and conspired to restrain trade and to monopolize the market for inclusive tours to Australia and New Zealand. Foremost appeals from the district court's judgment in favor of Qantas. We affirm.

MONOPOLIZATION

Three essential elements constitute "monopolization" under section 2 of the Sherman Act:

(1) possession of monopoly power in the relevant market;

(2) wilfull acquisition or maintenance of that power; and

(3) causal antitrust injury.

Hunt-Wesson Foods, Inc. v. *Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980). Monopoly power is defined as the power to control prices or exclude com-

petition in the relevant market. *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

Although the district court's opinion, *Foremost International Tours, Inc.* v. *Qantas Airways Ltd.*, 478 F.Supp. 589 (D. Hawaii 1979), refrains from making an explicit finding regarding monopoly power, it specifically rejects as unpersuasive Foremost's evidence that Qantas possessed power to control prices in the relevant market. *Id.* at 596. Further, the district court's opinion explicitly states that the number of tour wholesalers in the relevant market doubled after Qantas initiated its in-house tour operations. *Id.* at 601. This statement indicates that the district court determined that Qantas lacked power to exclude competition. Therefore, we conclude that the district court, in its opinion, implicitly found that Qantas did not possess monopoly power in the relevant market. This conclusion is supported by the district court's adoption of formal findings of fact submitted by Qantas at the court's request. One such finding reads: "I find that Qantas at no time possessed monopoly power in the relevant market." The standard of review for findings of fact in antitrust actions is the clearly erroneous standard of Fed.R. Civ.P 52 (a). *See United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948). We affirm the court's finding regarding monopoly power as not clearly erroneous. Foremost's failure to prove monopoly power, an essential element of a monopolization claim, eliminates our need to consider the other two elements.

ATTEMPT TO MONOPOLIZE

Four essential elements constitute an attempt to monopolize under section 2 of the Sherman Act:

(1) specific intent to control prices or destroy competition in the relevant market;

(2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose;

(3) dangerous probability of success; and

(4) causal antitrust injury.

California Computer Products, Inc. v. *International Business Machines Corp.*, 613 F.2d 727, 736 (9th Cir. 1979). The district court found that Qantas did not possess the specific intent to monopolize the relevant market. The court wrote: "I find . . . that the evidence . . . fails to establish . . . predatory intent on the part of the defendants, and I further find that Qantas's entry into the wholesale tour market . . . [was not] designed to effect . . . an unreasonable restraint of trade . . . ." 478 F.Supp. at 601. After reviewing the record, we are unable to conclude that these findings are clearly erroneous. Fed.R.Civ.P. 52(a). Without proof of specific intent, Foremost's claim that Qantas attempted to monopolize the relevant market fails.

CONSPIRACY TO MONOPOLIZE AND RESTRAIN TRADE

The significant difference between an attempt under section 2 and a conspiracy under either section 1

or section 2 of the Sherman Act is that to establish a conspiracy the plaintiff must show that the defendant's specific intent was manifested by an agreement with another party. *See Hunt-Wesson Foods, Inc.*, 627 F.2d at 926. The district court found that the pooling arrangement between Qantas and Canadian Pacific Airlines did not include an agreement, express or implied, to refuse to sponsor Foremost's tours. At trial, Foremost introduced scant evidence on this claim, and nothing in the record suggests that the district court's finding is clearly erroneous. Fed.R.Civ.P. 52(a).

AFFIRMED.

Appendix C

UNITED STATES DISTRICT COURT

District of Hawaii

FOREMORST INTERNATIONAL TOURS, INC.
Plaintiff

v.

QANTAS AIRWAYS LIMITED, et. al.,
Defendants.

NO. CIV. 74-116-JWC

OPINION

Plaintiff brings this action seeking monetary damages for alleged violations of Section I and II of the Sherman Act and injunctive relief pursuant to Sections 4 and 16 of the Clayton Act. 15 U.S.C. §§ 1, 2, 15 and 16.

THE PARTIES

Plaintiff Foremost International Tours, Inc. is a corporation organized and existing under the laws of the state of Hawaii, having its principal place of business in the city of Honolulu, Hawaii. Foremost operates primarily as a tour wholesaler and, under the trade name Royal Road Tours, it packages, promotes and sells, through retail travel agencies, inclusive tours to Australia and New Zealand. Qantas Airways Limited is an international air carrier in-

corporated under the laws of the Commonwealth of Australia having its principal place of business in Sydney, Australia.

BACKGROUND—RELATIONSHIP OF THE PARTIES

Within the market here at issue, tours such as those sold by the plaintiff are termed "inclusive" in that they consist of a package, the component parts of which are both the "land portion", *e.g.*, hotel accommodations, car rental, motor coach transport and sight-seeing arrangements, as well as round-trip air transportation to the destinations selected by the passenger. An airline which of necessity must provide the latter service is termed the "sponsoring carrier" pursuant to rules imposed by the International Air Travel Association (IATA), whose membership is composed of international airlines and whose regulations must be approved by the Civil Aeronautics Board (CAB).

From 1969 through March 31, 1974, Qantas was the "sponsoring air carrier" for plaintiff's Royal Road Tours to Australia and New Zealand. In October of 1972, the parties reduced their relationship to a formal written agreement for the tour year effective April 1, 1973 to March 31, 1974. This contract was an exclusive agreement whereby certain of Foremost's Royal Road Tours would be available only to Qantas as sponsoring air carrier and such other participant air carriers as Qantas would designate. In consideration for this contract, the plaintiff agreed to use its best efforts to package and promote the tours and defendant agreed to provide the air transportation for same as well as to bear a portion of the promotional expenses and pay Foremost a commis-

sion for the passengers flying on defendants' airline.

Between 1969 and 1973, sales of the Royal Road Tours to the South Pacific increased as did the payments which Qantas made to the plaintiff pursuant to their joint effort. The record discloses that during the early part of 1973, Qantas actively considered acquiring a controlling interest in plaintiff's Royal Road Tour operation. Though preliminary negotiations were undertaken by the parties to this effect, the transaction was never consummated. Rather on November 7, 1973, Qantas informed Foremost of its intention not to renew their agreement due to expire the following March, and on April 1, 1974, Qantas itself entered the tour wholesaling market, packaging and selling inclusive tours through one of its divisions, Qantas Holidays.

The actions of Qantas which attended both the termination of its relationship with Foremost and its subsequent entry into the market at issue form the basis for the plaintiff's complaint.

PROCEDURAL HISTORY OF THE ACTION

Foremost brought the instant suit on May 27, 1974 and simultaneously filed for a preliminary injunction to prevent Qantas from conducting an in-house tour operation and from engaging in certain practices related thereto. After an evidentiary hearing, this court (District Court Judge Pence sitting) granted, in part, plaintiff's request for preliminary injunctive relief. *Foremost International Tours, Inc.* v. *Qantas Airways, Ltd.*, 379 F. Supp. 88 (D. Hawaii 1974), *aff'd.* 525 F.2d 281 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

Because certain of defendants' actions at issue fell within the regulatory jurisdiction of the CAB, this court exercised initial antitrust jurisdiction over the case but stayed most proceedings pending the CAB's determination of the issues raised in plaintiff's complaint to be filed with that body. 379 F. Supp. at 95.

Thereafter, a full evidentiary hearing was held before Administrative Law Judge Argerakis in which Qantas was found to have violated no provisions of the Federal Aviation Act, with the exception of a violation of Section 411, 49 U.S.C. § 1381, stemming from certain printing errors in its tour brochures which had the effect of misleading the public as regards the content of the tours advertised. On review before the CAB pursuant to 14 C.F.R. § 302.28, the decision of Judge Argerakis was affirmed and modified to the extent that the issue concerning the "exchange rate", discussed *infra*, was decided squarely in favor of Qantas. CAB Order 78-10-129.

In the proceedings before the CAB, the vast majority of the factual questions relating to the antitrust violations here alleged were litigated. Thus the decision of that body contained specific findings which would have exculpated the defendants here were these determinations binding on the district court in terms of its antitrust jurisdiction. On this basis, Qantas subsequently moved the court for an order vacating permanently the preliminary injunction and for summary judgment, arguing that the factual findings and legal conclusions of the CAB which related to the alleged Sherman Act violations were *res judicata* as regards the instant litigation. This motion was denied by oral ruling on January 4, 1979, the court

finding that it owed no deference to the determinations of the CAB as far as the antitrust issues were concerned.

Qantas thereafter filed a Petition for a Writ of Mandamus and related relief to the Ninth Circuit Court of Appeals seeking to block relitigation of the antitrust issues in the district court. This motion, too, was summarily denied, as was defendants' subsequent petition for a Writ of Certiorari to the Supreme Court in this same connection.

Shortly before trial commenced, Qantas once more moved the court for an order estopping the plaintiff from relitigating any factual issues resolved in the proceedings before the CAB. This motion was denied in general, the court finding that the CAB was without jurisdiction to determine the antitrust issues in suit, given the limited regulatory authority delegated to that body by Congress. Memorandum and Order, April 6, 1979. However, the court did accept certain findings of the CAB as *res judicata* for purposes of the instant litigation, the enumeration of which is not material at this point. As this discussion continues any such findings of the CAB which the court has accepted as *res judicata* will be specifically indicated.

ALLEGED VIOLATIONS UNDER SHERMAN I & II — ELEMENTS

Count One of plaintiff's complaint alleges that Qantas has monopolized the inclusive tour market in the South Pacific, has attempted to monopolize such market and has conspired with others to monopolize the

market, all in violation of Section II of the Sherman Act, 15 U.S.C. § 2. Count Two of the complaint charges Qantas with an unlawful combination and conspiracy in restraint of trade in conjunction with Canadian Pacific Airlines Limited (CPAir) in violation of Section I of the Sherman Act, 15 U.S.C. § 1.

In the recent case *Cal. Computer Products* v. *Intern. Business Machines*, No. 77-1563, slip op. at 2172 (June 21, 1979), the Ninth Circuit articulated in some detail the requisite elements to be established in a case involving alleged violations of Section II of the Sherman Act.

Where the charge is monopolization, three elements must be proven: (a) the possession of monopoly power in the relevant market, (b) the willful acquisition or maintenance of that power, and (c) causal antitrust injury. *Cal. Computer Products*, slip op. at 2181. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Monopoly power "is the power to control prices or exclude competition", and is often defined with reference to defendant's share of the relevant product and geographic market. *Cal. Computer Products*, slip op. at 2181; *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

The second element of a monopolization claim requires that the defendant is shown to have engaged in "willful" acts directed at establishing or retaining its monopoly. No specific intent to monopolize need be shown, nor do defendant's acts need to have been unlawful if undertaken by an ordinary enterprise, unendowed with monopoly power. "The test is wheth-

er the defendant's acts, otherwise lawful, were *unreasonably* restrictive of competition." *Id.* at 2182; *Gough* v. *Rossmoor Corp.*, 487 F.2d 373, 376 (9th Cir. 1973). In this sense, the second element under Sherman II analysis is similar to that under Sherman I, the key distinction being that, in a case involving the latter provision, a conspiracy must also be shown.

The third element, that of causation, is largely related to standing and need not be discussed at length for reasons hereinafter appearing.

There are four elements to a claim under the "attempt to monopolize" provision of Sherman II: (a) specific intent to control prices or destroy competition with respect to a part of commerce, (b) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, (c) a dangerous probability of success, and (d) causal antitrust injury. *Cal. Computer Products*, slip op. at 2183.

Absent direct proof, the "specific intent" requirement may be established by proof of a Section I violation resulting in a substantial restraint of trade. Although market power is a relevant consideration to the determination of intent, where a Section I violation is established, intent may be inferred. *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977). A permissible inference of intent may also arise in conjunction with proof of illegal predatory conduct; since specific intent is difficult to establish by direct evidence, such inferences often form the basis for the imposition of liability. *Hallmark Industry* v. *Reynolds Metals Co.*, 489 F.2d 8 (9th Cir. 1973).

The second element under the attempt provision of Section II, that of "predatory conduct", requires proof of illegal activity directed to effectuate an *unreasonable* restraint of trade. Such conduct may involve contracts or agreements between parties or unilateral action by one antitrust offender. *Cal. Computer Products*, slip op. at 2184; *Greyhound Computer Corp.* v. *IBM Corp.*, 559 F.2d 488 (9th Cir. 1977).

"Dangerous probability of success", the third element to be considered, may be established either by direct proof of market power or by inference from proven specific intent to monopolize. *Cal. Computer Products*, slip op. at 2184.

The final causation element is similar to that under an actual monopolization claim and is primarily a standing question.

The elements of a claim arising under Section I of the Sherman Act are as follows: (a) the existence of a combination or conspiracy, (b) entered into by the parties in order to achieve monopoly power and effectuate an unreasonable restraint of trade, and (c) causal antitrust injury. *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976). While claims under Section I are limited to those involving concerted activity, the analysis entailed is similar to that undertaken under monopolization claims pursuant to Section II, the emphasis being upon evidence of an *unreasonable* restraint of trade resulting from action undertaken pursuant to the conspiracy or agreement.

RELEVANT MARKET

An essential initial determination regarding claims under either Sherman I or II involves definition of the relevant market within which the violations are said to have occurred. *Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1973). In the instant case, plaintiff contends that the market upon which the court's inquiry must focus is that in which both Foremost and Qantas competed: the wholesaling of inclusive tours to Australia and New Zealand which were available to purchasers in North America, Europe, Japan and Southeast Asia. Foremost's position is straight forward; since the travel locations are unique and the species of tours at issue form a distinct category of travel offerings, the relevant market is thus clearly defined. Further argued is the absence of cross-elasticity between these tours and the many others on the market due to the fact that the travel destinations involved offer sight-seeing and leisure opportunities to the tourist which are unavailable elsewhere.

Defendants assert that plaintiff has failed to establish an accurate definition of the relevant market. This argument is two-tiered.

First, Qantas at trial offered the coined term "discretionary dollar" as indicative of the actual market within which all tour wholesalers compete. In theory, according to defendant, entities providing travel packages actually compete with the manufacturers of mink coats, yachts and similar luxury items, the purchase of which is possible only where the prospective buyer possesses the requisite "discretionary" income beyond that needed to sustain the basic essentials of life.

I do not accept that "discretionary dollar" argument, for were antitrust courts to adopt it, no plaintiff in the business of providing luxuries to the consumer could ever establish a viable relevant market for purposes of the Sherman Act.

The second argument offered by defendants is more plausible in that it at least focuses on the travel market itself. Qantas claims that, within the tour wholesale marketplace, many destinations are cross-elastic with each other, including those here at issue. Specifically, defendants argue that tours to various points on the globe are actively considered by those who may eventually purchase a package to the South Pacific. For this reason, defendants assert that the relevant market for purposes of this case is that encompassing the world-wide tour wholesaling market, rather than that argued by plaintiff.

The burden is of course on Foremost to establish the relevant market as a requisite to proving its case. *Gough* v. *Rossmor Corp.* 585 F.2d 381 (9th Cir. 1978). The court, after hearing the evidence adduced at trial, is persuaded that this burden has been met. It appears that the travel destinations here involved are indeed unique in terms of what they offer to the tourist. For this reason the degree of cross-elasticity argued by the defendants is negligible and the court therefore adopts the plaintiff's definition of the relevant market for purposes of the instant case.

THE QUESTIONS OF CAUSATION AND MONOPOLY POWER

For purposes of the following analysis, proof of causation will be accepted provisionally with little comment. The court assumes that plaintiff, if it could demonstrate the violations alleged, would sustain some form of cognizable antitrust injury as a result of such violations, plaintiff being in direct competition with the defendants in the relevant market. 15 U.S.C. § 15; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

As to the issue of monopoly power, a key element of the "monopolization" claim under Sherman II, and one of inferential significance as regards the other claims asserted, the court makes no finding. However, the court is unpersuaded by plaintiff's argument to the effect that merely because Qantas is a major air carrier to the South Pacific and a member of IATA, it possesses the requisite monopoly power to satisfy the demands of the Sherman Act. Furthermore, plaintiff has offered no concrete evidence regarding the market share of the defendant where such factor is usually a key component in a case involving allegations of monopoly power. *See, Greyhound Computer Corp.* v. *IBM*, 559 F.2d 488 (9th Cir. 1977). Since the bulk of the evidence adduced at trial concerns the conduct of the defendants and a proper determination as to the nature of this conduct, further inquiry into the monopoly power of the defendants at this time is unnecessary.

ALLEGED PREDATORY CONDUCT

The alleged predatory acts of Qantas complained of in plaintiff's complaint are voluminous and for purposes of analysis may be categorized in the following manner: (1) Conduct of Qantas prior to the termination of its relationship with Foremost, (2) conduct of Qantas subsequent to the termination allegedly directed specifically against Foremost, and (3) post-termination conduct of Qantas attending its entry into the tour wholesaling market but not specifically directed against Foremost.

PRETERMINATION CONDUCT

At trial, plaintiff attempted to show that certain actions taken by Qantas pursuant to its contractual agreement with Foremost were of a predatory nature, undertaken by the defendant at a time when its intention to enter the market was formulated but unrevealed to the plaintiff. The evidence adduced consisted largely of the testimony of the owner of Foremost, Mr. Ronald Fenwick, and of internal Qantas memoranda, all relating to the tentative negotiations between the parties regarding a possible acquisition of Royal Road Tours by the defendants. While the record indicates that selling price and other terms were discussed, it is equally clear that no formal agreement was ever consummated despite the apparent good faith efforts of certain Qantas executives to convince their superiors of the advantages of the deal.

Evidence was also introduced establishing that, during the period of these negotiations, certain data were supplied by Foremost to the defendants regard-

ing plaintiff's operations. This information took the form of business reports supplied by plaintiff as well as seminars conducted by Foremost and attended by Qantas employees in which the latter group was familiarized with the procedures followed in processing sales of Royal Road Tours. It should be noted that no trade secret or similar proprietary protection is claimed for the data here involved nor was any claim of confidentiality attached at the time of its delivery.

Plaintiff takes the position that it was induced by Qantas, through its discussion of a possible acquisition, to supply the information described above, while the defendant masked its intention to enter the market and utilized the expertise of Foremost, freely given, in order to "gear up" for its own entry into active competition with plaintiff. This assertion is unsupported in the record.

In light of the close working relationship between the parties, the exchanges of data appear to be pursuant to a bona fide joint effort to increase sales. As to the alleged misrepresentations regarding Qantas's possible future use of an in-house tour department, the record indicates that, while that alternative was considered during the time in question, no decision had been reached which would give rise to a presumption of something less than fair dealing on the part of Qantas. For these reasons, the court finds that the pretermination conduct of Qantas regarding its relationship with plaintiff does not constitute actions of a predatory nature under Sherman Act standards.

POST-TERMINATION CONDUCT OF QANTAS ALLEGEDLY DIRECTED AGAINST PLAINTIFF

The second category of defendants' activities which plaintiff urges evidences predation involves those acts undertaken by Qantas subsequent to termination of its relationship with Foremost and which arguably were intended to have an unlawful effect on competition vis-a-vis the ability of Foremost itself to compete in the relevant market.

These actions fall into two groups. First, plaintiff cites a course of conduct allegedly designed by Qantas to permit it to unlawfully subsume plaintiff's position in the tour wholesaling market. Second, plaintiff argues actions allegedly intended by Qantas to deprive plaintiff of the ability to compete, *i.e.*, defendants' unlawfully restricting Foremost's access to air transportation.

THE ALLEGED ASSUMPTION BY QANTAS OF FOREMOST'S MARKET POSITION

Plaintiff, at trial, in asserting that Qantas unlawfully subsumed its position in the market, placed great emphasis upon a comparison of Qantas brochures with those of Foremost. Plaintiff argues that the pamphlets advertising both tours were so similar in color, format, size and design that Qantas's intention to displace Foremost can thereby be inferred, inasmuch as Royal Road Tours had been in the market years before the entry of Qantas. In addition, plaintiff argues that the components in the defendants' tours at issue were largely duplicative of those

in its own packages, the overall similarities resulting in confusion in the mind of the public as to true identity of the entity providing each of the tours. Such confusion, it is argued, was intended by Qantas since it would innure to the airline's benefit, the defendants reaping the rewards of the good will generated by Foremost over the prior years.

Upon the basis of the evidence before it, this court concludes that defendant's brochures at issue, neither in format nor content, evidence an intent by Qantas to subsume Foremost's position in the market. The brochures are basically dissimilar and are easily distinguishable. Their size is of standard proportion and their colors, although somewhat similar in many instances, are in common use in the tour industry. The face of the brochures shows the defendant's name in bold type and contains the unmistakable likeness of a Koala bear with which defendants have been associated for many years. Consequently, I do not find the brochures of the defendants deceptively similar to those of the plaintiff either intentionally or otherwise.

The congruence of the components offered in the tours of both entities is an unavoidable fact resulting from the generic categories of tours into which both those of plaintiff and defendants fall. For example, each party offers the "fly/drive" tour which, by definition, contains air transportation and car rental arrangements. Thus the similarity in components is to be expected and in no way supports an inference of predation as urged by plaintiff here.

Plaintiff offered some evidence regarding alleged "switching tactics" on defendants' part whereby inquiries regarding plaintiff's Royal Road Tours were

diverted by Qantas in an effort to push its own product. There was also some evidence of confusion which existed in the marketplace, immediately subsequent to Qantas's entry, as to exactly which entity, Foremost or Qantas, was providing which specific tour.

The evidence supporting the alleged "switching tactics" was unpersuasive for the purposes introduced, as was the testimony regarding the confusion resulting from defendants' commencement of its in-house operation. That Qantas employees mailed their own brochures to prospective customers is in no way predatory and the confusion in the market place is readily understandable in a situation such as this. Qantas entered a market in which Foremost continued to compete and the two entities had for years before been thought of as operating these types of tours in tandem.

The court is unpersuaded that any such conduct evidences predatory intent under the provisions of the Sherman Act.

The second species of conduct allegedly directed specifically against Foremost is that which arguably was designed to deprive of the ability to compete. In this connection, plaintiff points to Qantas's refusal to book reserved seating space for Foremost tour passengers during the month of December, 1974. Evidence indicates that the "block space" bookings involved were "wait-listed" when requested, in conformance with Qantas policy since the quota reserved for such bookings was filled at the time in question for the flights indicated. It appears that Foremost was treated no differently than any other tour wholesaler similarly situated. Qantas, subsequent to the

termination of its agreement with plaintiff, was of course under no obligation to render preferential treatment to Foremost. It is important to note that Qantas confirmed Foremost's requests for block space on other occasions subsequent to the termination.

Plaintiff further alleges an unlawful conspiracy between defendants and Canadian Pacific Airlines (CPAir) intended to eliminate Foremost as a competitor of Qantas. It is asserted that the alleged conspiracy had the effect of eliminating CPAir as a possible sponsoring air carrier for Royal Road Tours. It is this alleged conspiracy which forms the basis for Count Two of plaintiff's complaint, the Sherman I violation.

After Qantas had terminated its sponsorship of Foremost tours, Foremost approached CPAir as a possible successor to Qantas as a sponsoring air carrier. A representative of CPAir who lacked corporate authority to speak for the company ventured the opinion that such a joint venture would be unlikely because of a pooling agreement between Qantas and CPAir involving travel destinations for Foremost tours. CPAir had never been a sponsoring carrier for the plaintiff, nor was a formal proposal ever submitted by plaintiff to CPAir, since shortly thereafter Air New Zealand agreed to sponsor Royal Road Tours and a relationship was then established which continues to date.

No concrete evidence was advanced supporting plaintiff's contention that the Qantas/CPAir pooling agreement, sanctioned by IATA, was conspiratorial in nature under Sherman Act standards. Rather the evidence suggests that CPAir's reluctance to affiliate

with Foremost was the product of an independent business judgment whereby that airline determined that the venture would not be advantageous as compared with the other commitments it had at the time, including the pooling agreement with Qantas.

Therefore, the alleged conspiracy between Qantas and CPAir cannot support a claim under either Section I or II of the Sherman Act.

In light of the foregoing, the court finds that none of the conduct undertaken by Qantas subsequent to the termination of plaintiff and allegedly directed specifically against Foremost to drive it from the market is the type of activity from which an intent to monopolize the relevant market can be inferred. Likewise, this conduct in no way constitutes an effort to achieve or exercise monopoly power as prescribed by the Sherman Act.

POST-TERMINATION CONDUCT OF QANTAS NOT SPECIFICALLY DIRECTED AGAINST PLAINTIFF

The final category of allegedly predatory conduct on the part of Qantas consists of the following.

First, it is argued that Qantas deliberately included certain errors in its brochures at the time it entered the market, thereby deceiving the public to the effect that it was offering tours of a higher quality and at lower prices than those of its competitors. At the hearing before the CAB, the administrative law judge found that the brochures in question did contain errors and that such errors constituted a violation of section 411 of the FAA and would have to be

corrected. In addition, it was determined at that hearing that no intent was shown on the part of Qantas to misrepresent the content or price of its tours. After considering the evidence produced at trial, I am in agreement with the latter finding.

As its second contention, plaintiff asserts that Qantas offered for sale to the public extremely low priced, but in reality, non-existent tour packages shortly after it went in-house. This charge stems from the advertisements of the defendants relating to the "$805 fly/drive tour" to Australia. The dispute focuses primarily upon the alleged non-availability of the hotel rate which Qantas used to cost the land portion of the tour. The evidence adduced at trial established that the rather low nightly charge indicated was bona fide, apparently provided by the hotel owner on a "one time only" basis in order to stimulate continued use by Qantas of the chain involved. Though no passenger ever purchased the "$805" tour, I concur with the finding of the CAB to the effect that the package, while available to a small number of potential travelers, was a legitimate tour offering which would have been provided to buyers on a "first come, first served" basis. Therefore, the advertisement of the "$805" tour does not evidence predation for purposes of the instant case.

Plaintiff further argues that Qantas's refusal to use the "Computour" system developed by Foremost prior to termination was a predatory act. Computour is essentially a computer program whereby special itinerary tours could be laid out and the cost of same determined with great speed and accuracy. Prior to the termination of their agreement, defendants pur-

chased from plaintiff exclusive rights to the use of the system for a consideration of $90,000. After it entered the tour wholesale market, Qantas refrained from utilizing the program which apparently did not readily accommodate the type of product it was selling. Inasmuch as Qantas had purchased the rights to the system, it was under no obligation to permit plaintiff to utilize it or to redesign the system to suit its own needs. Therefore, I find that the purchase and subsequent non-use of Computour by defendants in no way constitutes predatory behavior.

ALLEGED BELOW COST PRICING

At this juncture we come to the key issue in the litigation and the crux of plaintiff's case, the alleged below cost pricing of defendants' tours. In support of this contention, the plaintiff makes two arguments.

CONVERSION RATE OF EXCHANGE

Plaintiff's first proposition is that Qantas is receiving United States dollars for the sale of its tours in the United States and Canada and is paying for land tour accommodations in Australia with Australian dollars, and that using the rate of exchange applicable to the conversion of United States dollars to Australian dollars during the relevant period results in a loss to Qantas in the land tour operation.

However, the defendant Qantas has demonstrated that no such conversion as argued by plaintiff takes place. It contends, and the evidence shows, that the great portion of the revenue which Qantas generates in this country is spent in the United States on the purchase of aircraft and parts, so that all United

States dollars received here remain in the United States to be applied to such expenditures. To the extent that the expenditures here exceed revenue received in the United States, Australian dollars must be converted to United States dollars with which to pay the difference. Qantas is therefore justified in using the rate of exchange applicable to converting Australian dollars to United States dollars. If this rate is used in the computation, Qantas's sale of the land portion of the tour in Australia shows no loss.

The CAB, upon being presented with this same question, approved Qantas's conversion rate and method of computation. This court originally ruled that this CAB finding was *res judicata* here. However, under an offer of proof by both parties, this issue has been entirely relitigated. I therefore find that Qantas's election to use the rate of exchange applicable to the conversion of Australian dollars to United States dollars is proper as a reasonable business judgment utilizing a legitimate economy of integration, and that no inference of predation can be drawn therefrom.

ADMINISTRATIVE EXPENSE AS ELEMENT OF COST

Plaintiff's second argument in support of its contention that the land portion of the tours are being sold below cost is far more complex and far reaching. To begin with, the defendants admit that they supply their land portion of the tours to their customers at their actual cost of acquisition, and that no administrative expense incurred in connection therewith is charged to the passengers. It is Qantas's

position that the land components offered in the tours are, in essence, an accommodation which it affords to its customers in order to stimulate air travel and that any administrative effort undertaken in this regard is absorbed by its regular staff without additional expense.

In answer to this contention, plaintiff insists that arranging the land accommodations involves administrative overhead, some allocable portion of which must properly be assigned to defendant's average variable cost in conducting its wholesale tour operation. Further, if any such expense is charged to defendant's costs incurred in supplying the land portion of the tours, sales of such tours result in a loss.

The court is persuaded that there is some measure of administrative expense properly allocable to the land tour operations which should be included in any computation of profit or loss resulting from such operation. If we were therefore to apply strict Areeda-Turner analysis as adopted by the Ninth Circuit, it would appear that Qantas has provided the land portion of its inclusive tours at below its average variable costs, *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975). In another environment this might well constitute predation and a *per se* violation of Sherman II.

SHERMAN ACT CONCEPTS APPLIED

Let us then turn to the task of applying Sherman Act concepts to the factual situation with which we are presently confronted. As indicated above, Qantas is an international airline carrier engaged in the

business of providing and selling air transportation. As such, it is primarily in competition with other airlines performing the same function, all of whom are operating in a highly regulated field under the supervision of the CAB. The inclusive tour concept by which land transportation and accommodations are furnished at cost to customers of Qantas who purchase air transportation is conceived of by Qantas as a promotional program designed to stimulate air travel on its line and thus improve its competitive position with other airlines. There is little evidence to indicate that Qantas, in offering such an inclusive tour, had any predatory intention directed toward Foremost or anyone else.

In the last analysis, plaintiff's claim that the "below cost" pricing of Qantas is "predatory" must be tested by an examination of the definition of that term in an antitrust context. Such definition is clearly stated in *Janich Bros., Inc., supra*:

> "Pricing is predatory only where the firm foregoes short term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits. . . . Therefore the product must be such that if predatorily priced, rivals are likely to be driven out of the market or excluded, allowing the firm to raise prices." (Citations omitted.) 570 F.2d at 856.

Plaintiff's argument fails for two reasons. First of all the environment which the record here discloses is simply not the kind of setting in which the evils of "predatory pricing" as defined by *Janich* are likely to occur. There is nothing in the record to suggest that Qantas is presently foregoing profits on its tour

operation which it later intends to recoup from increased prices. To the contrary, the entire tour packages offered by Qantas were and are quite profitable to the airline and, in this sense, no real "losses" are sustained in connection therewith.

An argument can be made that the uncharged administrative expenses at issue constitute a "loss" to be later recouped. However, it is abundantly clear that the primary purpose of all Qantas's programs is to sell seats on its airplanes, thus generating the considerable airfares which are the real profit incentive behind the tour offerings at issue. Thus, when viewed in this context, the significance of the administrative expenses involved in the land portion of the tours becomes *de minimis*. Moreover, any future increases in the price of the tours offered will be automatically reviewed by the CAB.

Second, there is no evidence in the record to support a finding that tour wholesalers such as Foremost are likely to be driven out of business due to the practices here complained of. The plaintiff had no difficulty in finding another airline to sponsor its tours and operates profitably to this date. More significantly, the record discloses that the number of competitors in the relevant market has dramatically increased rather than decreased since Qantas went in-house. Whereas, in 1974, there were only four tour wholesalers providing tours of the type with which we are here concerned, there are at present at least nine such entities, including the plaintiff itself, actively competing for shares of the market.

Thus, Foremost has not established "predatory"

pricing on the part of the defendants, as the meaning of that term is applied to cases involving the Sherman Act. Moreover, the plaintiff has failed to demonstrate any tangible injury to competition arguably produced by Qantas's entry into the tour wholesale market.

Finally, plaintiff argues that it would be contrary to Sherman Act principles to permit a member of a comprehensively regulated industry such as Qantas, which enjoys profits resulting from a governmentally guaranteed rate structure, to use a portion of revenues earned in this fashion to subsidize its economic endeavors in an unregulated sphere.

If we analyze the alternatives in the context of this case, it would appear that if such cross-subsidization were allowed it would arguably hamper the ability of the independent tour wholesaler to compete in the relevant market but it would definitely benefit the consumer by bringing about lower tour rates.

If, on the other hand, such cross-subsidization were not permitted, the position of the independent tour wholesalers in the market would be protected but the consumer would be deprived of lower tour fares.

It would appear therefore that we have a question of policy as to whether the independent tour wholesaler should be protected at the expense of the consumer, or whether the consumer should be required to pay higher tour rates in order to permit the independent tour wholesalers to more effectively compete with the airlines in the land tour market. A policy question of this nature is more appropriately addressed to a legislative body.

To some extent Congress has addressed itself to the problem in the enactment of the Federal Aviation Act and the creation of the CAB, one of the functions of which is to guard the "public interest" in the aviation field. This agency has approved Qantas's inclusive tour program and has found it compatible with those standards of "public interest" which it is required to apply in such cases as this. While the CAB rulings in this respect are not conclusive in this antitrust action, its decision on this important issue is nevertheless persuasive.

I find therefore that the evidence adduced in this case fails to establish predatory conduct or predatory intent on the part of the defendants, and I further find that Qantas's entry into the wholesale tour market under the circumstances indicated, neither was designed to effect nor results in an unreasonable restraint of trade within the relevant market at issue. The evidence likewise fails to show any unlawful conspiracy. Accordingly, judgment shall be for the defendants with costs.

DEFENDANTS' COUNTERCLAIM

Defendant Qantas Airways, in the instant action, has asserted a counterclaim against plaintiff in its amended answer of September 10, 1974. This counterclaim states six causes of action, four which allege acts of unfair competition and violations of resolutions of the International Air Transport Association (IATA) which have the force of law under the FAA, 49 U.S.C. § 1301, *et seq.*, and two causes alleging breach of contract. Plaintiff has here moved for dismissal of all counterclaims pursuant to Fed. R. Civ. P. § 41(b)(c).

At trial, Qantas apparently elected to abandon its claims against the plaintiff as no arguments regarding them was offered by Qantas's counsel and little evidence was introduced relating directly thereto. Although certain of the evidence adduced at trial in connection with plaintiff's case in chief and the Qantas defense has inferential significance as regards defendants' counterclaims, such evidence falls far short of that needed to support the counterclaims in this case. For these reasons, the motion of plaintiff to dismiss the counterclaims of Qantas is hereby granted.

Attorneys for the defendants shall prepare findings of fact, conclusions of law, and judgment appropriate to this decision.

DATED: August 6, 1979

JESSE W. CURTIS
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT

District of Hawaii

FOREMORST INTERNATIONAL TOURS, INC.
Plaintiff

vs.

QANTAS AIRWAYS LIMITED, et. al.,
Defendants.

No. Civ. 74-116-JWC

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

I. *The Parties And The Industry.*

1. Plaintiff FOREMOST INTERNATIONAL TOURS, INC. (hereinafter FOREMOST) is a corporation organized and existing under the laws of the State of Hawaii, having its principal place of business in Honolulu, Hawaii. Tr. 157, 158.

2. FOREMOST is primarily an independent tour wholesaler. An independent tour wholesaler, *inter alia*, packages and sells inclusive air tours to the travelling public through retail travel agents and sponsoring or participating air carriers at a single, all-inclusive price. Unlike a retail travel agent, the independent tour wholesaler does not issue airline tickets and does

not deal directly with the travelling public in the sales of the tours. Tr. 158, 164.

3. FOREMOST packages, promotes and sells, through retail travel agencies, inclusive air tours to Australia and New Zealand from the United States and Canada under the trade name "Royal Road Tours". Tr. 158; Complaint, paras. 7, 11.

4. Defendant QANTAS AIRWAYS LIMITED (hereinafter QANTAS) is a public company incorporated and existing under the laws of the State of Queensland, Commonwealth of Australia. Its principal place of business is in Sydney, Australia. Compaint, para. 4.

5. QANTAS is an international air carrier and holds a foreign air carrier permit, issued by the Civil Aeronautics Board of the United States (hereinafter CAB) pursuant to Section 402 of the Federal Aviation Act, 49 U.S.C. §1372. This permit authorizes QANTAS to engage in foreign air transportation between Australia and the United States on the routes specified in the permit. Complaint, para. 4.

6. QANTAS is a member of the International Air Transport Association (hereafter IATA), an association of most international air carriers operating throughout the world. *Inter alia*, IATA sets the rates, fares, terms and conditions for international air transportation subject to the approval of the various governments involved. In the case of the United States of America, all resolutions of IATA embodying intercarrier agreements on rates, fares, terms and conditions for international air transportation which involve the foreign air transportation of the United States are submitted to the CAB for approval under Section 412 of the Federal Aviation Act, 49 U.S.C.

§1382. The Articles of Association of IATA and the rate-making machinery of IATA were approved by the CAB under Section 412 of the Act on February 19, 1946. Complaint, paras. 8, 9; CAB Order 4525, approving Agreement C.A.B. No. 493, February 19, 1946 D. Ex. 262.

II. *The Inclusive Tours Involved.*

7. An inclusive air tour combines roundtrip air transportation with ground accommodations and ancillary services, such as hotel arrangements, sightseeing trips and local transportation in the form of car rentals, air, rail and motor coach tours. Tr. 1238-39.

8. The inclusive air tour is sold by retail travel agents and sponsoring and participating carriers as a package at an all-inclusive price encompassing the applicable inclusive tour air fare and the charge for the land arrangements. Tr. 680-81.

9. Under the IATA resolutions governing such tour programs, the "sponsoring carrier" of an inclusive air tour issues an "IT" (inclusive tour) number to the tour program. The "IT" number qualifies the tour for an extra commission to be paid to retail travel agencies which sell the tour. The "sponsoring carrier" may designate other carriers as "participating carriers" in the tour program sponsored by it. In general, the tour wholesaler puts together the land arrangements of the tour package and seeks sponsorship by an IATA carrier upon mutually agreeable terms. Insofar as the tour wholesaler is concerned, these terms generally encompass an agreement by the "sponsoring carrier" to pay for the printing costs of the brochures advertising the tour program, and to support

the tour program with advertising and sales promotion activities paid for by the "sponsoring carrier". Tr. 164.

10. The inclusive tour air fares and minimum land arrangements were established by IATA Resolutions which were approved by the CAB under Section 412 of the Federal Aviation Act. To sell inclusive tours provided by such CAB approved IATA Resolutions, carriers must have on file with the CAB effective tariffs encompassing the approved inclusive tour air fare and the minimum land arrangements. D. Ex. 1, 2, 3, 4. These IATA Resolutions set forth the inclusive tour air fare and the conditions applicable to the fare, such as the minimum stay required in Australia or New Zealand, the required land arrangements, and the minimum price of the tour. These requirements were encompassed in effective tariffs of QANTAS filed with the CAB. Complaint, para. 12; D. Ex. 1, 2, 3, 4.

11. The inclusive tours involved in this case consist of fly/drive, fly/coach, fly/rail and fly/tour inclusive tours from the United States and Canada to Australia and New Zealand. These types of tours are sometimes referred to as "freewheeling" tours in view of the fact that the tours do not involve fixed itineraries and the tour purchaser is free to travel about Australia or New Zealand according to his own schedule.

12. The inclusive tours of Qantas involved in this case satisfied and were in every way consistent with the requirements of the CAB approved IATA Resolutions and the effective tariffs filed by QANTAS with the CAB encompassing such IATA Resolutions. D. Ex. 1, 2, 3, 4; Tr. 680-81.

III. *Relevant Market.*

13. The relevant product market involved in this case is the wholesaling of inclusive tours from the United States and Canada to Australia and New Zealand. The inclusive tours consist of roundtrip air transportation and various land arrangements in Australia and New Zealand, usually consisting of hotel accommodation, airport transfers, sightseeing and local transportation in the form of a car, coach, rail or air. Complaint, para. 12; Tr. 1238-39.

14. The evidence in the case showed that the travel destinations of the inclusive air tours involved in this case are unique in terms of what they offer to the tourist, and the marketplace in which FOREMOST and QANTAS compete for such tourists is in the United States and Canada. Tr. 1642, 1628; Complaint. para. 12. I find negligible cross-elasticity and substitutionality. *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F. 2d 1264 (9th Cir. 1975).

IV. *Monopoly Power*

15. After QANTAS entered the relevant market in 1974 by packaging and selling its own inclusive air tours, no injury to competition or competitive conditions resulted in the relevant market. Tr. 398-412.

16. In 1974, there were 357 independent tour wholesalers in the United States. In 1975, there were 414 independent tour wholesalers in the United States. In 1977, there were 529 independent tour wholesalers in the United States. Any of these independent tour wholesalers could package and market a freewheeling tour program or any other kind of

tour program in competition with QANTAS, FOREMOST or any other tour wholesaler. Tr. 1587, 402-03, 743, 745, 1624, 936-37; D. Ex. 189, 190, 191.

17. Prior to QANTAS' entry into the inclusive air tour market on April 1, 1974, there were four tour wholesalers providing freewheeling type inclusive tour programs from North America to the South Pacific, one of whom was FOREMOST. In addition, other wholesalers such as American Express were packaging and selling other types of non-freewheeling inclusive air tours in the relevant market. Subsequent to the termination of the QANTAS/FOREMOST relationship, the number of tour wholesalers providing freewheeling inclusive tour programs from North America to the South Pacific increased to six in the tour year April 1, 1974 to March 31, 1975, to eight in the tour year April 1, 1975 to March 31, 1976 and to nine in the tour year April 1, 1976 to March 31, 1977. Thus, from the time that QANTAS entered the tour wholesale market here involved through its Qantas Holidays inhouse tour wholesale department, until March 31, 1977, the number of tour wholesalers providing freewheeling types of inclusive tour programs from North America to the South Pacific more than doubled. In addition, in the post 1974 period, other tour wholesalers continued to sell competing non-freewheeling inclusive air tours in the relevant market. Tr. 398-412; P. Ex. 2. In 1974 and to the present time, there were and are no entry barriers to the packaging and sale of inclusive air tours in the relevant market by independent tour wholesalers. Tr. 402-03, 743, 1624.

18. In 1974, there were six international air carriers on the South Pacific routes from the United

States and Canada—QANTAS, British Airways, Union de Transports Aeriens (UTA), Canadian Pacific Airlines (CPAir), Pan American and Air New Zealand. At the present time, British Airways no longer operates on the South Pacific from the United States but Continental Airlines of the United States now operates on the route. There are therefore still six international air carriers on South Pacific routes from the United States. Any one of these carriers can sponsor or operate a freewheeling tour program in competition with QANTAS or with any other carrier or tour wholesaler, at any time. Tr. 1199, 1204, 1207-08, 1218, 1622.

19. In 1974 and through 1979, QANTAS operated only one flight a day from North America to Australia and none to New Zealand. QANTAS did not, and never was in a position to dominate the relevant market for the reasons that: (1) competing carriers could and did arrange competing inclusive tour programs with various wholesalers; (2) wholesalers with whom QANTAS had programs could change to competing carriers at any time; (3) QANTAS was restricted by government agreement in its routes, and to some extent, with respect to frequencies and capacity. Tr. 1204, 1257-58.

20. At trial, FOREMOST claimed to be five times as large as any other tour wholesaler offering tour programs from North America to Australia and New Zealand, regardless of the type of tour. The evidence in the case showed and I so find that in the first tour year in which QANTAS competed with FOREMOST, from April 1, 1974 through March 31, 1975, FOREMOST achieved greater profits from the sale of such

tours than QANTAS when the subsidy QANTAS had been giving to FOREMOST prior to April 1, 1974 is deducted from the gross income of FOREMOST. The evidence showed that, after the deduction of the subsidies paid by QANTAS to FOREMOST, FOREMOST's gross income from the sale of its tours increased by almost 200 percent in the first year of competition with QANTAS. Tr. 379, 677-79, 530-32, 549-51, 477-82, 1069-70; D. Ex. 110, 166 B to M inclusive, 167.

21. FOREMOST produced no evidence of QANTAS' market share in the relevant market after April 1, 1974 or at any other time. The evidence in the case, however, conclusively shows that FOREMOST was not damaged by QANTAS' entry into the relevant market and QANTAS' conduct in the marketplace and further, and more importantly, that competition and competitive conditions were not damaged or adversely affected. On all of the evidence, I find that QANTAS at no time possessed monopoly power in the relevant market. Tr. 398-412, 391, 677-79, 1254, 1390, 1199, 1204, 1207-08, 1218, 1622.

V. *Attempt to Monopolize*

22. FOREMOST charged QANTAS with an attempt to monopolize the relevant market. FOREMOST attempted to prove a number of alleged predatory acts which may be categorized in the following manner:

(a) Conduct of QANTAS prior to the termination of its relationship with FOREMOST;

(b) Conduct of QANTAS subsequent to the termination allegedly directed specifically against FOREMOST; and

(c) Post-termination conduct of QANTAS upon its entry into the relevant market not specifically directed against FOREMOST.

A. The History Of The Business Relationship Between Foremost and Qantas And The Circumstances Of Its Termination.

23. Commencing in 1969 and continuing through March 31, 1974, QANTAS was the sponsoring carrier of a series of inclusive air tours to Australia and New Zealand from the United States and Canada involving freewheeling tour programs packaged by FOREMOST as an independent tour wholesaler. Tr. 176, 206-08, 213-14, 227.

24. In September, 1972, George Howling, Sales and Service Director of QANTAS, contacted Ronald Fenwick, President of FOREMOST, to talk about the existing programs and the future QANTAS/FOREMOST programs. A meeting was held between Fenwick and Howling at which Fenwick stated that he wanted a five-year agreement involving QANTAS sponsorship of FOREMOST'S freewheeling tours. At this time and in prior years, QANTAS' contractual arrangements with FOREMOST had been on an annual basis. Tr. 890, 896-99.

25. No five-year agreement ultimately was concluded. At a subsequent meeting in Sydney, Australia on October 11-12, 1972, Howling and Fenwick reached a one-year agreement. Under this agreement, QANTAS obtained exclusive sponsorship of the FOREMOST freewheeling Royal Road Tour programs in Australia and New Zealand from the United States and Canada for one year commencing April 1, 1973 and ending March 31, 1974. Pursuant to this agreement, QANTAS had the right to designate other participating carriers in the Royal Road Tour programs covered by the agreement and the agreement

was renewable solely at the option of QANTAS. P. Ex. 88; Tr. 900-03, 227, 231-34.

26. In the discussions leading to the agreement, Howling and Fenwick jointly set a goal of 15,000 tour passengers for the tour year covered by the agreement, April 1, 1973 to March 31, 1974. Pursuant to the terms of the agreement, QANTAS agreed to pay FOREMOST a total of $750,000 for the exclusivity of the FOREMOST freewheeling Royal Road Tour program and also agreed to pay $60,000 toward the cost of printing the brochures for the program. The $750,000 agreed figure was based upon the desired goal of 15,000 passengers at a subsidy payment to FOREMOST of $50 per passenger. Tr. 900-03, 227, 231-34.

27. FOREMOST was to be paid, and was paid by QANTAS $750,000 and $60,000 even though FOREMOST might not and in fact did not meet the projected goal of 15,000 passengers. Tr. 903-04.

28. The agreement was formalized in a letter dated October 12, 1972 between QANTAS and Data International Limited, a subsidiary of FOREMOST, and was executed by both parties. P. Ex. 88.

29. In acordance with the terms of the October 12, 1972 agreement, QANTAS subsequently designated Air New Zealand and CPAir as participating carriers in the FOREMOST freewheeling tour program for the tour year 1973-74. Tr. 902-03, 1489-90; P. Ex. 151.

30. One week after the October 12, 1972 agreement was signed, IATA passed Resolution 810e, Section N, on October 19, 1972 which, when effective, would render it a violation of the Resolution for a

member carrier, such as QANTAS, to make sector payments, subsidy payments or commission payments to a tour wholesaler in which the member carrier did not have a controlling interest. The Resolution was to become effective on April 1, 1973. Tr. 904-06; D. Ex. 2.

31. As a result of the adoption of the IATA Resolution 810e, Section N, on October 19, 1972, QANTAS considered the possibility of purchasing a controlling interest in a tour wholesaler. In this connection, Howling contacted Fenwick in January of 1973 to inquire if QANTAS could purchase a controlling interest in FOREMOST. Fenwick replied in the negative, but stated that he would form another company in which QANTAS could purchase a controlling interest. Tr. 909-10.

32. Subsequently, Howling met with Fenwick on the morning of January 17, 1973 in Sydney to discuss the purchase of a controlling interest in the proposed new company. There was also an afternoon meeting on the same day between Howling and Fenwick at which Peter Roberts, Corporate Studies Analyst of QANTAS, and Graham Miner, Principal Legal Officer of QANTAS were present. At this afternoon meeting, Fenwick mentioned $5,000,000 as the purchase price of a controlling interest in the proposed new company. Tr. 910-12, 914, 1030-32.

33. Thereafter, Howling prepared a memorandum and submitted it to the Policy Committee of *QANTAS* recommending the purchase of a controlling interest in the new company by QANTAS. P. Ex. 21. The Howling memorandum (P. Ex. 21) was rejected by the Policy Committee which wanted detailed financial studies on the proposed puchase of a controlling in-

terest in the new company before it would consider the proposal further. Tr. 915-16, 1065-66.

34. Roberts and Miner thereafter met with Fenwick and FOREMOST's attorneys to develop further the financial details of the proposed purchase of a controlling interest in the company to be formed by Fenwick and to be known as Royal Road Tours, Inc. In actual fact, Royal Road Tours, Inc., had been formed by Fenwick in Honolulu on January 10, 1973 prior to Fenwick's meeting with Howling on January 17, 1973 in Sydney. Tr. 519-20, 1032-33.

35. Roberts requested financial data about FOREMOST because Royal Road Tours, Inc. was a new company with no assets. The information requested consisted of audited accounts of operating revenues, expenditures, profits, assets, liabilities. Fenwick would not and did not furnish any of the data pertaining to FOREMOST requested by Roberts. Tr. 1034.

36. QANTAS then sought alternatives. Fenwick offered to produce and did produce projections of passenger production for the next three years; the projected budget of Royal Road Tours, Inc. of expenditures and staff requirements; the inventory of assets to be transferred from FOREMOST to Royal Road Tours, Inc.; a proposed purchase agreement transferring a controlling interest in Royal Road Tours, Inc. to QANTAS; and employment agreements whereby Messrs. Fenwick, Resch and Corbett, presently working for FOREMOST, would become employees of Royal Road Tours, Inc. Tr. 1035-36, 1043-45, 526; P. Ex. 3, 4, 4A, 22, 22A, 23, 25.

37. Roberts requested additional financial information from Fenwick at this meeting, only some of which was ever received. After the meeting, Roberts

and Miner returned to Sydney where Roberts began to prepare a draft Board paper (P. Ex. 5) on the proposed purchase, which was to be based upon his own investigations in Honolulu, the materials furnished by Fenwick and the data received from within QANTAS. The draft Board paper was never considered by the Policy Committee. Tr. 1044-48.

38. None of the documents furnished by Fenwick at the meeting in Honolulu or subsequently were confidential. No claim of confidentiality, trade secret, or similar proprietary protection is made by FOREMOST with respect to the documents of their contents. All of the documents were furnished to and received by QANTAS in good faith in the course of *bona fide* discussions concerning the proposed purchase by QANTAS of a controlling interest in Royal Road Tours, Inc. Tr. 526-27.

39. At some time after Roberts and Miner returned to Sydney, Fenwick called QANTAS about the progress of the proposed purchase. Howling referred Fenwick to William Harding, Director of Finance for QANTAS. Harding told Fenwick that the proposed purchase price of $5,000,000 for a 51% interest in Royal Road Tours, Inc. was exorbitant. He told Fenwick that if QANTAS were to continue discussing the matter it would be necessary to ascertain precisely how Fenwick calculated the $5,000,000 figure and why this was an appropriate sum for a 51% interest in Royal Road Tours, Inc. Harding requested this financial information from Fenwick and invited him to come to Sydney to discuss the matter further. Fenwick did not come to Sydney and Harding did not receive any financial data from Fenwick in response to his request. As the Director of Finance for QAN-

TAS and a member of the Policy Committee, Harding refused to endorse the spending of $5,000,000 by QANTAS to buy an interest in Royal Road Tours, Inc. The matter was dropped and never was raised again. Tr. 919-20, 1061, 1067-69.

40. QANTAS never entered into any agreement to purchase a controlling interest in Royal Road Tours, Inc., nor was any letter of intent ever signed or delivered by QANTAS, FOREMOST or any of FOREMOST's subsidiaries. Tr. 257, 921; P. Ex. 23.

41. The negotiations by QANTAS were conducted in good faith by QANTAS and cannot support any finding of unlawful or predatory conduct under the antitrust laws. Tr. 910-20; P. Ex. 21.

42. John Rowe became Regional Director, The Americas, for QANTAS on April 1, 1973. In September, he suggested to Howling that the FOREMOST program was very expensive and should be reviewed. Rowe recommended to Howling that he consider whether the FOREMOST program should be continued beyond 1974. Tr. 1210-13, 1224-25.

43. In accordance with Rowe's recommendation, QANTAS in October, 1973 began to consider the concept of operating its own in-house freewheeling tour program from the United States and Canada to Australia and New Zealand. In a report (P. Ex. 77) prepared by QANTAS employee Peter Archer, Tours Manager, North America, Archer stated that he believed QANTAS had the expertise to operate and man an in-house program in April, 1974 from existing QANTAS staff. Tr. 925, 1337-40.

44. Thereafter, on November 7, 1973 a meeting was held at the FOREMOST offices in Honolulu to re-

view the FOREMOST tour passenger production to date and to discuss the continuation of the QANTAS/FOREMOST relationship beyond March 31, 1974. The meeting was attended by Messrs. Howling, Rowe, Archer and Peter Emery, Regional Sales Manager for the Americas, on behalf of QANTAS and Fenwick on behalf of FOREMOST. At this meeting, Fenwick stated that FOREMOST had produced approximately 4,000 to 5,000 passengers under the October 12, 1972 agreement to the date of the meeting, November 7, 1973. After further discussions concerning the number of passengers produced to date, the initial projection of 15,000 passengers under the October 12, 1972 agreement was reduced to 12,000 passengers for the tour year ending March 31, 1974. Tr. 925-27, 1226-27, 1308-09, 1334-36.

45. Fenwick then projected 21,000 passengers for the 1974-75 tour year and stated that he expected the payments by QANTAS under the October 12, 1972 agreement would continue, i.e. $50 per passenger. Based upon Fenwick's passenger projection of 21,000 at $50 per passenger, QANTAS would be required to pay FOREMOST approximately $1,100,000, if the October 12, 1972 agreement was continued beyond March 31, 1974. Tr. 928.

46. Principally because of its projected cost, Howling told Fenwick at the November 7, 1973 meeting that QANTAS would not continue the October 12, 1972 agreement beyond March 31, 1974 and that QANTAS would go in-house and produce and sell its own freewheeling tour program from North America to Australia and New Zealand effective from April 1, 1974. Fenwick replied that QANTAS would not be competent to operate an in-house tour program, that

FOREMOST would produce a better product at better prices, that FOREMOST would compete with QANTAS in the market and would produce competitive products with another sponsoring carrier. Fenwick stated further that FOREMOST would match or undercut any price QANTAS offered. Tr. 928-29, 1227.

47. It was agreed at the November 7, 1973 meeting that there would be no adverse publicity by either party with respect to the termination of the sponsorship by QANTAS of the FOREMOST program effective March 31, 1974 and that QANTAS and FOREMOST would honor the October 12, 1972 agreement to the termination date of March 31, 1974. QANTAS continued doing business with FOREMOST in accordance with the terms of the October 12, 1972 agreement until its expiration on March 31, 1974. Tr. 930, 989-90, 1255.

48. Fenwick called Howling in Sydney shortly after the November 7, 1973 meeting and asked if Howling would reconsider the decision to terminate the association effective March 31, 1974 and asked Howling to meet with him to discuss a financial settlement or QANTAS would face legal action. Howling called back the next day and told Fenwick the decision was final. Tr. 294-95, 931, 987 .

49. The QANTAS sponsorship of the FOREMOST freewheeling tour programs terminated in accordance with the terms of the October 12, 1972 agreement on March 31, 1974. Air New Zealand then immediately became the sponsoring carrier for the FOREMOST freewheeling tour program from North America to Australia and New Zealand effective from April 1, 1974. Tr. 404-05.

50. During the FOREMOST/QANTAS business relationship, FOREMOST furnished to QANTAS sales and production reports (P. Ex. 56, 101, 118) with regard to the sales of Royal Road Tours. No confidentiality was attached to these reports by FOREMOST when furnishing them to QANTAS. FOREMOST ceased sending the reports to QANTAS after the November 7, 1973 meeting in Honolulu. Tr. 538-541.

51. During the FOREMOST/QANTAS business relationship, FOREMOST undertook to familiarize QANTAS sales and marketing personnel with the manner in which FOREMOST personnel handled telephone inquiries from travel agents regarding the contents, prices and features of the jointly marketed FOREMOST/QANTAS inclusive tours. The objective of these familiarization sessions was to strengthen the joint marketing efforts of QANTAS and FOREMOST in support of the October 12, 1972 agreement and accomplish the joint objective of producing 15,000 Royal Road passengers during the 1973-1974 tour year. These familiarization sessions were in the mutual interest of QANTAS and FOREMOST and involved visits by sales and marketing representatives of QANTAS to the FOREMOST offices to observe how inquiries from travel agents were handled, so that the QANTAS personnel would be more familiar with the nature of the inquiries regularly received by a tour wholesaler. Similar programs were conducted by all wholesalers with whom QANTAS had programs and the sessions in every instance were designed to improve the joint marketing of the tour products. Tr. 694, 1351-52; Tr. DDW 72-73, 304-05.

52. None of the information given to QANTAS per-

sonnel during these sessions with FOREMOST or at any time during the QANTAS-FOREMOST relationship was of a confidential nature and there was no claim of confidentiality attached by FOREMOST at the time of delivery. No trade secret or similar proprietary protection is claimed by FOREMOST for any of the data, business or sales reports, or training material furnished to QANTAS during its business relationship with QANTAS. Tr. 526, 538-41.

53. When the negotiations were taking place with regard to the possible purchase by QANTAS of a controlling interest in Royal Road Tours, Inc. QANTAS had considered the alternative of packaging and selling its own in-house freewheeling inclusive air tours from North America to Australia and New Zealand. However, no decision to produce such tours in-house was reached until long after the negotiations with FOREMOST were terminated and the proposed purchase of a controlling interest in Royal Road Tours, Inc. was abandoned by QANTAS. As soon as the decision was made by QANTAS to go "in-house" effective from April 1, 1974, FOREMOST was advised. No misrepresentations ever were made by QANTAS to FOREMOST as to its intentions to enter the market with its own in-house tour programs. At all times during their business relationship and at the time of its termination, QANTAS dealt fairly with FOREMOST. Tr. 925, 928, 1310, 1336-37.

Foremost.

B. Conduct of Qantas Subsequent to the Termination Allegedly Directed Specifically Against

54. With the termination of the QANTAS/FOREMOST agreement on March 31, 1974, QANTAS itself,

on April 1, 1974, undertook the role of a tour wholesaler and packaged and sold a series of freewheeling tour programs to Australia and New Zealand from the United States and Canada through one of its departments known as Qantas Holidays. Tr. 932-33.

55. Qantas Holidays had been formed as a department of the Sales and Customer Services division of Qantas in 1972 to fulfill the role of a tour wholesaler in connection with a series of tours to Southeast Asia from Australia. John Alderson was the Manager of Qantas Holidays in Australia from its formation in 1972 until he left Qantas in 1975. Tr. 895, 1473.

56. Toward the end of 1973, Howling requested Alderson to put together a program of freewheeling tours to be operated by QANTAS from the United States and Canada to Australia and New Zealand from April 1, 1974. The tour program was to include fly/drive, fly/coach, fly/rail and fly/tour inclusive tours. Qantas Holidays was to arrange for the land components to be included in the tours. Alderson and his staff thereafter contacted the suppliers of the desired land components of the tours and negotiated rates for the land components to be included in the tours to be operated by QANTAS from April 1, 1974. The land components consisted of items such as hotel accommodations, coach, rail, local air and automobile transportation, airport transfers and sightseeing, the usual elements included in the freewheeling type of tours. Tr. 932, 1474-75.

57. QANTAS did not attempt to arrange exclusive contracts with the land suppliers, so that certain components would be available on QANTAS tours only. FOREMOST, however, did attempt to make such ar-

rangements and had certain exclusive contracts with some land suppliers. Tr. DDW 385-86, 434-35, 486, 499-500, 600-12, 641-45; D. Ex. 42, 50, 59.

58. When the Qantas freewheeling tour program from North America to Australia and New Zealand was assigned to the Qantas Holidays unit in San Francisco effective April 1, 1974, QANTAS did not incur any new or additional administrative or overhead expenses. No additional staff was hired by QANTAS and the staff required by Qantas Holidays in San Francisco simply was transferred from other departments within QANTAS. The staff assigned to the in-house tour program consisted of the same persons who had been dealing with inclusive tour programs with independent tour wholesalers in the United States on behalf of QANTAS prior to April 1, 1974. Tr. 896, 932-33, 993, 996, 1357-58.

59. The Qantas Holidays unit in San Francisco utilized existing space within the QANTAS premises and personnel from the existing QANTAS staff in San Francisco. Anthony Jewiss originated the Qantas Holidays unit in San Francisco in February, 1974 and staffed the unit from existing reservations staff in QANTAS in San Francisco. Jewiss and three other persons composed the staff of Qantas Holidays in San Francisco. The number of staff in the Qantas Holidays unit has remained the same since February 1974. Tr. 1357-58, 1390-92.

60. The brochures issued by Qantas upon entry into the tour wholesale market were dissimilar from the joint FOREMOST/QANTAS brochures used in prior years. The face of the QANTAS in-house brochures showed QANTAS' name in bold type and contained the unmistakable likeness of a koala bear, a

marketing symbol with which QANTAS has been associated for many years. The QANTAS brochures, issued on April 1, 1974, do not mention the names "Royal Road Tours" or "FOREMOST". Tr. 384-85, 668-69, 1219-20; P. Ex. 1Y-1FF, D. Ex. 208-215.

61. The size of the QANTAS brochures was standard in the industry and in use in the tour marketplace for many years. The colors of the QANTAS brochures, although similar to the colors used in prior years by FOREMOST, were in common use in the tour industry. QANTAS used brown and red colors for the Australia tour brochures. These colors are associated with Australia in the tour industry, and are the house colors of QANTAS whose aircraft are painted in brown and red. Similarly, the blue and green colors used for the New Zealand tour brochures are associated with New Zealand and are the colors of the Air New Zealand aircraft. The colors of the brochures are not identified with a tour wholesaler. If they have any associative meaning at all, the colors are associated with the destinations involved in the tours. Tr. 1408-09, 1415-19.

62. FOREMOST acknowledged that it had no proprietary or other interest in the design, size, or colors used in the brochures. In any event, the brochures of QANTAS were in fact not deceptively similar to prior FOREMOST brochures, or brochures produced by FOREMOST during the 1974-1975 tour year for competition with the Qantas tour programs. Tr. 384-85, 668-69, 1219-20, 1408-09, 1415-19; P. Ex. 1A-1FF, D. Ex. 208-215.

63. The similarity of the tour components offered in the tours of both FOREMOST and QANTAS is an unavoidable result of two firms competing with each other in the same geographic area with tours in the

same generic category. The freewheeling tours involved contain the same basic elements. All of the tours offer air transportation, hotel accommodations and local transportation either in the form of a rented car, a coach or bus, rail or air. P. Ex. 1A-1FF; D. Ex 208-215.

64. In May, 1974, following the termination of the FOREMOST/QANTAS business relationship, Messrs. Fenwick and Alfred Resch, Vice-President of FOREMOST, requested two employees of FOREMOST, a travel agent and an advertising executive associated with FOREMOST, to call QANTAS, Air New Zealand and BOAC in Honolulu to make inquiries about Royal Road Tours. At the time the calls were made, QANTAS was the reservations agent in Honolulu for Air New Zealand and BOAC and as such answered their telephones. At the time the calls were made, the FOREMOST Royal Road Tour brochures for the tour year commencing April 1, 1974 were not on the market and the prior year's tour brochures had expired. Tr. PDW 4-5, 17-20, 21-28, 31-37, 51-53, 62; D. Ex. 109, pp. 12-13.

65. The callers were advised by the QANTAS employees that QANTAS no longer sponsored the Royal Road Tour programs, that the new Royal Road Tour brochures were not yet available, that QANTAS had no information concerning any current Royal Road Tours and that QANTAS had a tour program of its own which may be of interest to the caller. In response to requests that tour brochures be mailed to addresses given by the callers, QANTAS mailed QANTAS tour brochures, the only brochures then on the market. The travel agent actually booked a QANTAS tour for two passengers, whose names and addresses were furnished by Resch of FOREMOST, since there

was no Royal Road Tour available. The booking subsequently was cancelled by the travel agent on instructions of Resch. QANTAS employees made no false representations or unfairly misled potential FOREMOST tour customers. Tr. PDW 15-16, 17-28, 30-37, 43-44, 51-55.

66. For a short time after the entry of QANTAS into the market as a wholesaler and the termination of the FOREMOST/QANTAS relationship, travel agents continued to call QANTAS to book air travel for purchasers of Royal Road Tours of FOREMOST. In accordance with the instructions issued by QANTAS to its sales and reservations staff, the travel agents were informed that QANTAS no longer sponsored the Royal Road Tour program and were referred to FOREMOST to book the land portion of the tour. There was no evidence that QANTAS diverted prospective passengers to QANTAS tours. Tr. 701-03, 1310C-D, PDW 90-91, 99, 108.

67. Any confusion in the marketplace during the time immediately following the termination of the FOREMOST/QANTAS relationship and the entry of QANTAS into the market as a wholesaler with its own tour program, is readily understandable in view of the previous long standing sponsorship by QANTAS of the FOREMOST Royal Road Tour program. Tr. 169-171, 176-77, 206-08, 213-14.

68. After the termination of the FOREMOST/QANTAS business relationship, FOREMOST requested QANTAS to book reserved seating space for FOREMOST tour passengers for travel from the United States to Australia on December 13 and 14, 1974 and return travel to the United States in Janu-

ary, 1975. When these "block space" booking requests were received by QANTAS, several months before the intended date of travel, FOREMOST was advised that these "block space" bookings would be wait-listed" since the quota reserved for such bookings on the flights requested had been filled. Block booking requests were received and filled in accordance with established QANTAS policy regarding "block space" bookings. FOREMOST was treated no differently than any other tour wholesaler similarly situated. FOREMOST's requests for "block space" bookings on available dates subsequent to the termination of the FOREMOST/QANTAS business relationship were confirmed by QANTAS. Tr. PDW 77-78, 81-86, 93.

69. All of the "block space" booking requests of FOREMOST subsequent to the termination of the FOREMOST/QANTAS business relationship, which either were confirmed or "wait-listed", were either released by FOREMOST to other tour wholesalers or cancelled by FOREMOST. Tr. PDW 87-90, 122.

70. FOREMOST offered no evidence that it lost any tour passenger sales or that any FOREMOST tour group was unable to travel to the South Pacific as a result of the "wait-list" of the FOREMOST "block space" booking requests for December, 1974. Since the FOREMOST/QANTAS business relationship pursuant to the October 12, 1972 agreement was terminated on March 31, 1974, QANTAS was under no obligation to render preferential treatment to FOREMOST. Tr. 930, 989-96, 1255; D. Ex. 109, p. 9.

71. Subsequent to the termination of the FOREMOST/QANTAS business relationship on March 31, 1974, QANTAS continued to carry Royal Road Tour

purchasers. FOREMOST/Royal Road Tours purchasers travelled 1269 sectors aboard Qantas flights to the South Pacific during the 1974-75 tour year. Tr. 1347-50, 1398; D. Ex. 181, 249.

C. Post-termination Conduct of Qantas Upon Its Entry Into The Relevant Market Not Specifically Directed Against Foremost.

72. When QANTAS entered the tour wholesale market on April 1, 1974, the first edition of its tour brochures advertising its freewheeling inclusive tours contained errors regarding the content and price of its tours. There was, however, no intent on the part of QANTAS to misrepresent the content or price of its tours by reason of the errors. The errors were printing errors. In any event, all sales of the QANTAS tours were made in accordance with sales manuals which contained all of the correct information as to the content and price of the tours. Anyone who called inquiring about the tours was provided with correct information. Tr. 1374-76, Tr. PDW 163-65; D. Ex. 108, p. 51.

73. One of the tours offered for sale by QANTAS upon entry into the market on April 1, 1974 was a 10-day group fly/drive tour to Australia from the United States at a price of $805. The price of the tour encompassed a new 10-day group inclusive tour (GIT) air fare which became available for travel to Australia from the United States on April 1, 1974 in the amount of $674.10. The use of this GIT air fare was conditioned upon a minimum stay in Australia of 10 days duration by a minimum group of ten persons and the purchase of land arrangements in Australia at a minimum cost of $130. The fare and the conditions for its use were embodied in a Resolution of IATA which was approved by the CAB

and was embodied in effective tariffs of QANTAS filed with the CAB. Tr. 1388; D. Ex. 3, 4, 183.

74. The cost of the land arrangements to QANTAS, charged by the land suppliers were marked up to comply with the IATA minimum price for the land content of the tour of $130, which coupled with the applicable air fare of $674.10 resulted in a total cost of $804.10, which QANTAS then rounded off to $805. This $805 10-day group fly/drive tour to Australia was the price leader of the QANTAS inclusive tour program effective from April 1, 1974, and the advertising of the QANTAS program centered around the tour. Tr. 311, 1477-79; D. Ex. 3, 4; P. Ex. 96, 97.

75. As to the cost of the land arrangements included in this tour, QANTAS secured a special hotel rate from Noahs' Northside Gardens Hotel in Sydney of A$8 per shared twin room per night. Thus, each tour purchaser would be charged A$4 per night for hotel accommodations during the 10-day stay in Sydney required by that tour. Tr. 1478; D. Ex. 23.

76. The special A$8 per room rate obtained by QANTAS from Noahs' Northside Gardens Hotel was provided by the hotel in order to stimulate continued use by QANTAS of the Noahs' hotel chain in Australia. After the $805 tour was costed by QANTAS, based upon the A$8 room rate, the rate was subsequently limited by the manager of Noahs' Northside Gardens Hotel to one tour group. No group ever purchased the $805 10-day group fly/drive tour to Australia while it was on the market and no group ever requested the tour. Tr. 1478-79, 1386-87, PDW 231-32.

77. The A$8 per room rate used by QANTAS in costing and pricing the $805 10-day group fly/drive

tour was *bona fide*. Although the hotel rate used to cost the tour subsequently became available to only one group, the tour package was a legitimate tour offering which would have been provided to purchasers on a "first come, first served" basis. Under the circumstances, the advertisement and offering of the tour does not evidence any predation or predatory intent on the part of QANTAS. Tr. 1386-87, 1429-30, Tr. PDW 231-236; D. Ex. 23, 24.

78. During the course of the FOREMOST/QANTAS business relationship and prior to its termination on March 31, 1974, FOREMOST developed "Computour". "Computour" was essentially a computer program whereby special itinerary tours could be developed and the cost of the tours determined with great speed and accuracy. FOREMOST developed the idea and proposed to QANTAS an arrangement under which QANTAS would pay the cost of programming the Computour system and FOREMOST would give to QANTAS the exclusive right of use of the system. An agreement was reached (P. Ex. 90) whereby QANTAS paid $90,000 for the programming of the "Computour" system and QANTAS received the exclusive right to the use of the system for a period of five years from April 1, 1973 with an option to renew for an additional period of five years. Tr. 218-22, 414-17; P. Ex. 90.

79. With the termination of the FOREMOST/QANTAS business relationship on March 31, 1974 and the entry of QANTAS into the tour wholesale market, QANTAS did not use the "Computour" system because the system was not designed to cost a uniform tour package with a single all-inclusive tour price such as the freewheeling tours QANTAS put on

the market in 1974. The "Computour" system was suited for the costing of individual or group tours with special interests and no set itineraries. Tr. 416, 641-42.

80. Since QANTAS had purchased the exclusive rights to the "Computour" system from FOREMOST, QANTAS was under no obligation to permit FOREMOST to utilize the system or to redesign the system to suit the needs of QANTAS. Tr. 416-17, 641-42.

81. The purchase by QANTAS of the exclusive rights to the "Computour" system for $90,000 and the subsequent non-use of the system by QANTAS following the termination of the FOREMOST/QANTAS business relationship, in no way evidences unlawful or predatory behavior on the part of QANTAS. Tr. 221-22, 414-17, 641-42, 512.

82. In costing the land component elements of its inclusive tours, Qantas Holidays utilized the rate of exchange applicable in Australia and New Zealand for the conversion of Australian and New Zealand dollars into United States dollars. In actual fact, no currency exchange actually takes place. QANTAS does not transfer to Australia United States dollars earned from the sales of tours in the United States. All the revenue realized by QANTAS in the United States from the sales of tours or air transportation remains in the United States to pay for the purchase of aircraft, parts, stores and spares and to meet the operating expenditures of QANTAS in the United States. The United States dollar revenues realized by QANTAS in the United States remain in the United States to be applied to such expenditures. To the extent that expenditures in the United States exceed revenue realized in United States dollars, QANTAS must convert

Australian dollars to United States dollars to meet the difference in expenditures in the United States. Tr. 1074-75; D. Ex. 109, p. 5; Memorandum and Order of April 6, 1979, p. 9.

83. Since United States dollars realized from the sales of tours are not transferred to Australia to pay the suppliers of the land components of the tours, QANTAS does not incur any monetary conversion exchange cost in connection with the sales of inclusive tours in the United States and payment of the land suppliers in Australia. Therefore, in costing the land components of its inclusive tours, QANTAS is justified in using the rate of exchange applicable where Australian or New Zealand dollars are converted to United States dollars. Tr. 1074-75, 1094-99; D. Ex. 178-179.

84. The use by QANTAS of the rate of exchange applicable to the conversion of Australian dollars to United States dollars in costing the land components of its tour was, under the circumstances, proper and reasonable and the exercise of a reasonable business judgment utilizing a legitimate economy of integration. Accordingly, no inference of anticompetitive or predatory conduct or intent can be drawn from the use of this exchange rate by QANTAS in costing the land components of its inclusive tours. Tr. 1075, 1094-99.

85. As stated above, the inclusive tours here involved encompass roundtrip air transportation and land components and are sold at a single all-inclusive price. This price includes the applicable airfare, the charges for the land components involved in the tour, and the travel agent's commission on the land compo-

nents involved in the tour package. If a tour is sold directly by QANTAS, the travel agent's commission on the sale of the land components is not paid and the amount of the commission becomes additional revenue to QANTAS. Tr. 1238-39, 1520; D. Ex. 253-260.

86. The selling price of the QANTAS tours included the actual acquisition costs for the land components of the tours to be charged to QANTAS by the suppliers thereof. None of the tours were priced or sold below the actual acquisition costs of the land components. If a tour voucher is not used by the passenger, however, no acquisition cost is incurred by QANTAS and the portion of the tour price for that land component becomes additional revenue to QANTAS.

The selling price of all of QANTAS tours included the applicable inclusive tour air fare contained in the effective tariffs of QANTAS filed with the CAB. Tr. 1510, 1421, 1524-26, 316-17; D. Ex. 253-260, 4, 8, 10, 16, 17, 23, 39, 40, 46, 56, 60, 63, 65, 69, 71, 72, 103.

87. In pricing the tours QANTAS did not increase or markup the direct acquisition costs of the land components of the tours by any airline administrative expenses associated with the packaging or marketing of the land portion of the tours. For example, if the acquisition costs to QANTAS for the land components including the travel agent's commission associated with the sale of the land contents totalled $250, the QANTAS price of the land package to the tour purchaser was $250, provided this exceeded the required IATA minimum price of the required land package. Thus, QANTAS sold the land components of the inclusive tours to the traveling public at the same

price as the acquisition costs to QANTAS of the land components, plus travel agent's commission. Tr. 1512-24, 1543-44; D. Ex. 253-260.

88. Inclusive tour air fares are promotional or discounted air fares designed to stimulate travel by persons who otherwise might not travel and fill otherwise empty airline seats. The fares generate additional revenues for QANTAS which contribute to the payment of the overhead and administrative costs of QANTAS as well as contribute to the profit of QANTAS. The variable costs incurred by QANTAS in furnishing this promotional fare seat to the tour passenger did not exceed 20% of the applicable inclusive tour air fare, thus leaving 80% of the air fare for contribution to airline overhead and administrative expenses and profit. Tr. 1542, 1548-49, 1574-75, 1610-11.

89. No new or additional staff was hired by QANTAS to conduct the in-house tour operation and no new or additional premises were leased or purchased. The existing QANTAS staff and office facilities were utilized. The in-house tour operation simply became part of the overall airline operation of QANTAS. Tr. 896, 932-33, 993, 996, 1351-58.

90. During the first year of the QANTAS freewheeling inclusive tour program here involved, QANTAS realized a profit of A$112,486.95 from the land portion of the tours alone. Of this total amount A$53,748.05 represented pure profit to QANTAS by reason of unused tour vouchers. Unused tour vouchers are not refundable to the tour passenger. This pure profit of A$53,748.05, representing unused tour vouchers, had nothing to do with the markup of the land content of the tours ordered by the Court (*per* District Judge

Pence) in the preliminary injunction issued in 1974. The profit to QANTAS for the first tour year would have been at least this amount regardless of the markup ordered by the court since the markup related solely to airline overhead and administrative expenses of QANTAS and did not change the acquisition costs actually incurred by QANTAS for the land contents of the tours as charged by the suppliers thereof. Therefore, as the purchasers of the tour packages did not use all of the applicable land content tour vouchers, the pure profit to QANTAS of A$53,748.05 would have been the same whether or not the markup was ordered by the court in 1974. Tr. 1077-82, 1421; D. Ex. 123.

91. The primary purpose of all of the tour programs of QANTAS is to sell seats on QANTAS airplanes, generating air fare revenues which are the real profit incentive behind the tour offerings here at issue. The significance of the airline administrative expenses involved in the packaging of the land portion of the inclusive tours is *de minimis*. Tr. 1534, 1548-49, 1574-75, 890.

92. The entire line of tour packages offered by QANTAS from April 1, 1974 to date were and are profitable to QANTAS and no "losses" were and are sustained by QANTAS in connection with the sale of these tour packages. Tr. 1548-49, 1534, 1574-75.

93. QANTAS, in pricing its tours, at no time was foregoing profits on its in-house tour wholesale operation with the intention of achieving a monopoly and, among other monopoly benefits, recouping "lost profits" by increasing prices at some subsequent time. Tr. 1537, 1574-75, 1619-22; D. Ex. 123.

94. The CAB, in the proceeding before it, found that QANTAS' use of the inclusive tour air fares to cover the indirect and administrative costs of the in-house tour operation was not unlawful. Since the tour program was aimed at promoting airline traffic for QANTAS, the CAB held that the indirect administrative costs associated with the tour program may reasonably be allocated to airline operation and thus payable from the air fare. The CAB found that the inclusive tour program of QANTAS here involved and the pricing policy of QANTAS with respect to the tours was compatible with the "public interest" standards of the Federal Aviation Act. D. Ex. 108, 109, pp. 4-8.

95. On the evidence in the case, I find that QANTAS did not engage in any "predatory pricing" with respect to the pricing of its tours. Further, there has been no evidence of tangible injury to FOREMOST or to competition or competitive conditions in the relevant market as a result of QANTAS' entry into the tour market or the pricing of its tours. Tr. 398-412, 1543-44, 1549, 1514-75, 1619-22.

96. QANTAS and Canadian Pacific Airlines (CP-Air) are parties to a pooling agreement governing air transportation between Canada and Australia. The pooling agreement encompasses the sharing of revenue and capacity on the routes operated jointly and passenger traffic from Canada to Australia, and from Australia to Canada. The participation of QANTAS in the pooling agreement with CPAir was approved by the Minister of Transport of the Government of Australia. Tr. 1500-02; P. Ex. 123A.

97. The QANTAS/CPAir pooling agreement deals with the sharing of air fare revenues only and does not pertain to revenues derived from the sales of land contents of any tours. The freewheeling tour programs from Canada to Australia are not part of or related to the QANTAS/CPAir pooling agreement. Tr. 1491, 1500.

98. CPAir had been a participating carrier in the FOREMOST Royal Road Tour program from Canada to the South Pacific prior to the termination of the FOREMOST/QANTAS business relationship. After QANTAS notified FOREMOST that its sponsorship of the Royal Road Tours program would terminate on March 31, 1974, FOREMOST approached CPAir as a possible successor to QANTAS as a sponsoring air carrier of the Royal Road Tours program from Canada to the South Pacific. A representative of CPAir, who lacked corporate authority to speak for CPAir on the subject, ventured the opinion that such a joint venture with FOREMOST would be unlikely because of the existing pooling agreement between QANTAS and CPAir involving travel destinations for FOREMOST tours. Tr. 1489-90; P. Ex. 151.

99. FOREMOST never submitted a formal proposal to CPAir for sponsorship of a tour program since, shortly after contacting CPAir, Air New Zealand agreed to sponsor the FOREMOST Royal Road Tours program and a relationship was then established between FOREMOST as the independent tour wholesaler and Air New Zealand as the sponsoring carrier effective April 1, 1974 and which continues to date. Tr. 404-05.

100. At no time did QANTAS ever ask CPAir not to sponsor a FOREMOST tour program and at no time

did QANTAS ask CPAir not to carry FOREMOST tour passengers. Tr. 1321.

101. FOREMOST presented no evidence in support of its contention that the QANTAS/CPAir pooling agreement, approved by the Minister of Transport of the Government of Australia, was conspiratorial in nature under Sherman Act standards or had direct or indirect effect on restraining competition in the relevant market in this case, in which FOREMOST was a competitor. The reluctance of CPAir to affiliate with FOREMOST following the termination of the FOREMOST/QANTAS business relationship on March 31, 1974, was the product of an independent business judgment on the part of CPAir. CPAir elected to become a participating carrier in the QANTAS program effective from April 1, 1974 rather than become a sponsoring carrier of a FOREMOST tour program because the expense to CPAir in being a participating carrier in the QANTAS program would be substantially less than the expense to CPAir in sponsoring a FOREMOST program. Tr. 1502, 1489-90; P. Ex. 151.

102. FOREMOST also sought to claim that QANTAS' participation in IATA constituted a conspiracy or combination in violation of Section 1 of the Sherman Act. No probative evidence was produced by FOREMOST to sustain a Section 1 charge, and, on the basis of the evidence in this case, I find that QANTAS' participation in IATA is not a conspiracy or combination in violation of Section 1. Opinion of August 6, 1979, p. 11.

CONCLUSIONS OF LAW

1. In this action, FOREMOST charges QANTAS with violations of Sections 1 and 2 of the Sherman Act and seeks monetary damages pursuant to Section 4 of the Clayton Act. 15 U.S.C. §§1, 2 and 15. FOREMOST also sought injunctive relief pursuant to Section 16 of the Clayton Act. 15 U.S.C. §26.

This Court has jurisdiction of the parties and jurisdiction of the subject matter pursuant to 15 U.S.C. §§15, 26 and 28 U.S.C. §§1331, 1337.

The Procedural History of the Action

2. The action was commenced with the filing of the complaint on May 30, 1974. Simultaneously with the filing of the complaint, FOREMOST moved for a preliminary injunction to prevent QANTAS from conducting an in-house tour wholesale operation and from engaging in certain practices related thereto. After a brief evidentiary hearing, this Court (District Judge Pence) granted, in part, FOREMOST's request for preliminary injunctive relief. Because certain of the actions of QANTAS complained of in the complaint fell within the regulatory jurisdiction of the CAB, the Court exercised initial antitrust jurisdiction over the case but stayed most proceedings herein pending the CAB's determination of the issues raised in FOREMOST's complaint to be filed with the CAB. The grant of preliminary injunctive relief, the referral of the case to the CAB and the stay of proceedings pending determination by the CAB was affirmed by the Court of Appeals for the Ninth Circuit. *Foremost International Tours, Inc.* v. *Qantas Airways, Ltd.*, 379

F.Supp 88 (D.Hawaii 1974), *aff'd* 525 F.2d 281 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

3. Thereafter, a full evidentiary hearing was held before Administrative Law Judge Argerakis, at the conclusion of which he held that QANTAS had not violated any provision of the Federal Aviation Act in connection with its in-house tour wholesale operation with the single exception of a finding of a violation of Section 411, 49 U.S.C. §1381, stemming from certain printing errors in the QANTAS tour brochures which had the effect of misleading the public as regards the content of the tours advertised. However, Judge Argerakis held that the errors in the tour brochures were not deliberate or calculated to mislead the public. Judge Argerakis also concluded that the proper rate of exchange in the costing of the QANTAS land packages was the one urged by FOREMOST. However, Judge Argerakis found that the exchange rate issue was not a pivotal decisional factor in the case since the "losses" attributable to the use of an incorrect rate of exchange were miniscule. *Foremost International Tours, Inc.* v. *Qantas Airways Limited*, CAB Enforcement Proceeding, Docket 27631 (March 15, 1978). D. Ex. 108.

4. On review before the CAB pursuant to 14 C.F.R. §302.28, the Initial Decision of Judge Argerakis was adopted, except that, contrary to the Initial Decision of Judge Argerakis, the CAB found that QANTAS used a proper conversion rate of exchange. *Foremost International Tours, Inc.* v. *Qantas Airways, Ltd.*, CAB Enforcement Proceeding, Docket 27631, Order 78-10-129, D. Ex. 109.

5. In the proceedings before the CAB, the vast majority of the factual allegations relating to the antitrust violations alleged in this action were fully litigated. The decision of the CAB contained specific findings relative to those factual allegations which would have exculpated QANTAS in this action were those determinations binding on the District Court in the exercise of its antitrust jurisdiction. QANTAS subsequently moved the Court for an Order vacating permanently the preliminary injunction and for summary judgment, arguing that the factual findings and legal conclusions of the CAB, which related to the alleged Sherman Act violations, were *res judicata* in the present case. This motion was denied by oral ruling on January 4, 1979 (District Judge Pence); the Court found that it owed no deference to the findings and legal conclusions of the CAB insofar as the antitrust issues were oncerned.

6. QANTAS, thereafter, filed a Petition for a Writ of Mandamus and related relief with the Court of Appeals for the Ninth Circuit, seeking to block relitigation of the antitrust issues in the District Court. The petition was denied without opinion. A motion for a stay, pending the filing of a petition for a Writ of Certiorari, was denied by the Supreme Court in an Order dated March 24. 1979.

7. Shortly before trial commenced, QANTAS once more moved the Court for an order estopping FOREMOST from relitigating any factual issues resolved in the proceedings before the CAB. This motion was denied in general; the Court (District Judge Curtis) found that the CAB was without jurisdiction to determine the antitrust issues in suit, given the limited regulatory authority delegated to that body by Con-

gress in the Federal Aviation Act. However, the Court did accept the following findings of the CAB as *res judicata* for purposes of the instant antitrust litigation:

> 1. The mere fact that Qantas conducted an in-house tour operation did not, in itself, constitute a violation of the provisions of the Federal Aviation Act or the Sherman Act.
>
> 2. Qantas used the proper exchange rate of $1.00 (A) = $1.485 (U.S.) for conversion of U.S. dollars into Australian dollars in the pricing of the land portion of Qantas inclusive tours.
>
> 3. The air fare prices charged by Qantas in connection with the tours at issue conformed to the tariffs as set by the CAB and were not violative of Section 403(b) of the Federal Aviation Act.
>
> 4. In conducting its in-house tour operation, Qantas engaged in no practices as proscribed by Section 411 of the Federal Aviation Act, other than those violations stemming from the printing and distributing of tour brochures which contained misrepresentations of fact regarding the tours advertised.

Memorandum and Order of April 6, 1979, pp. 9-10.

The Issues Tried in this Court.

8. In its Memorandum and Order of April 6, 1979, the Court concluded, at Page 10:

> Thus, there remain in issue questions involving the [alleged]* below cost pricing of the land portion of the tours, and the extent to which these costs as well as the indirect administrative ex-

penses of the tours under Sherman Act analysis were properly recovered from the air fares charged, notwithstanding the fact that the fares conformed to the CAB tariffs. In addition, there remain to be determined similar questions of fact, for example, alleged "bait and switch" tactics by Qantas, its misappropriation of the plaintiff's tour business, misrepresentations on the brochures advertising Qantas' tours and the extent to which such brochures so closely copied the plaintiff's as to mislead the public into believing the two tours were provided by the same entity. As discussed above, all

*Tr. 107

of these questions and others remain in suit because they are relevant as to a predatory intent by Qantas in connection with an alleged attempt to monopolize the land portion of the tours at issue. As discussed above, these issues which address alleged Sherman Act violations occurring outside the regulatory sphere of the CAB could not be properly resolved by that body and therefore must be tried in this court.

9. FOREMOST and QANTAS both agreed to waive a jury trial and, accordingly, the trial by the Court on the issue of liability only under the antitrust laws commenced on April 11, 1979 and concluded on April 25, 1979.

10. The charges of predatory conduct in violation of the antitrust laws involved conduct of QANTAS prior to and subsequent to QANTAS' decision to package and sell its own in-house inclusive air tours in competition with FOREMOST. Whether an airline should be permitted to package and sell its own

inclusive air tours in competition with independent tour wholesalers is a matter of policy which is within the jurisdiction of the CAB.

11. Long before this action was commenced by FOREMOST, this issue was considered by the CAB in a general way when an IATA resolution authorizing airlines to package their own tours came before the CAB under Section 412 of The Federal Aviation Act of 1958. 49 U.S.C. §1382. Despite filed objections by a travel agent trade organization (ASTA), the CAB approved the IATA resolution under Section 412 after considering the competitive concerns of independent tour wholesalers and the public interest. CAB Order No. E-24886, Docket 17828 (March 23, 1967), D.Ex. 104; CAB Order No. E-24598, Docket 17828 (January 3, 1967), D.Ex. 1.

12. FOREMOST brought the issue specifically to this Court in the present action, and this Court referred the question to the CAB. *Foremost International Tours, Inc.* v. *Qantas Airways Ltd.*, 379 F. Supp. 88 (D. Hawaii 1974), *aff'd.*, 525 F.2d 281 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976). FOREMOST brought the issue to the CAB which held that the mere fact that QANTAS conducted an in-house tour program in competition with independent tour wholesalers did not constitute a violation of the Federal Aviation Act. CAB Order 78-10-129, D.Ex. 109, p. 3. FOREMOST did not appeal this decision.

13. By these decisions, the CAB has found, as a matter of policy, that an in-house inclusive tour program packaged and sold by an airline does not violate the Federal Aviation Act and is compatible with those standards of "public interest" which the CAB is required to apply.

14. In the proceeding before the CAB, the Board specifically found that QANTAS' entry into the tour wholesale market in competition with FOREMOST, and QANTAS' conduct in marketing and selling its tours, did not violate the public interest standards of the Federal Aviation Act, except with respect to certain misrepresentations in the tour brochures. While the CAB ruling in this respect is not conclusive in this antitrust action, its decision on this question is entitled to deference. Opinion of the Court dated August 6, 1979, p. 25.

15. However, based upon all of the evidence before this Court in this case, this Court is persuaded that mere entry by QANTAS into the relevant market by packaging and selling its own inclusive air tours and its conduct in the marketplace was not an attempt to monopolize and did not create a monopoly in violation of Section 2 of the Sherman Act.

16. There are three essential elements which must be proven to establish a claim of monopolization under Section 2 of the Sherman Act:

(a) the possession of monopoly power in the relevant market;

(b) the willful acquisition or maintenance of that power; and

(c) causal "antitrust" injury.

United States v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); *California Computer Products, Inc.* v. *International Business Machines Corp.*, F.2d , Trade Reg. Rep. (CCH) ¶62, 713, p. 77, 970 (9th Cir., Docket 77-1563 (June 21, 1979)).

17. The burden of proving monopoly power and monopolization under Section 2 of the Sherman Act rests with the plaintiff FOREMOST. *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *Gough* v. *Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978).

18. Monopoly power is the power to control prices or exclude competition. Evidence of monopoly power is the defendant's share of the relevant product and geographic market. *Greyhound Computer Corp.* v. *IBM*, 559 F.2d 488 (9th Cir. 1977).

19. FOREMOST failed to establish QANTAS' market share and its ability to control prices or to exclude competition. On the contrary, the evidence showed that there was free entry into the relevant market; that competition in the packaging and selling of inclusive air tours in the South Pacific increased rather than decreased after QANTAS' entry; that there was no damage to competitive conditions upon QANTAS' entry; and that QANTAS was never in a position to dominate the inclusive tour market because of competition and government regulation and restriction. Nor was there any probative evidence that QANTAS had the ability to control prices. *Greyhound Computer Corp.* v. *IBM*, 559 F.2d 488 (9th Cir. 1977); *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977).

20. Accordingly, I am unable to find that FOREMOST sustained its burden of proving that QANTAS possessed monopoly power. *California Computer Products, Inc.* v. *International Business Machines Corp.*, ...F.2d...., 5 Trade Reg. Rep. (CCH) ¶62, 713, p. 77, 970 (9th Cir., Docket 77-1563 (June 21, 1979));

United States v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

21. Even if QANTAS possessed monopoly power, FOREMOST failed to establish the second element of Sherman Act Section 2 monopolization, namely, that QANTAS excluded competition or unreasonably restrained competition in the relevant market. *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); *California Computer Products, Inc.* v. *International Business Machines Corp.*, ...F.2d...., 5 Trade Reg. Rep. (CCH) ¶62,713, p. 77, 970 (9th Cir., Docket 77-1563 (June 21, 1979)). QANTAS did not impose exclusively in its contracts with land suppliers in Australia and New Zealand, and there was no evidence that QANTAS excluded or attempted to exclude FOREMOST from the sponsorship of its tour programs by CPAir or any other air carrier serving the South Pacific. Significantly, immediately upon the termination of the QANTAS/FOREMOST business relationship, FOREMOST obtained the sponsorship of Air New Zealand for its programs. At no time was FOREMOST or any other tour wholesaler excluded from the relevant market.

22. On the evidence in the case, FOREMOST failed to meet its burden of establishing monopolization on the part of QANTAS in violation of Section 2 of the Sherman Act. *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); *California Computer Products, Inc.* v. *International Business Machines Corp.*, ...F.2d...., 5 Trade Reg. Rep. (CCH) ¶62,713, p. 77, 970 (9th Cir., Docket 77-1563 (June 21, 1979)).

23. The second aspect of FOREMOST's Section 2 Sherman Act claim is that QANTAS "attempted to monopolize" the relevant market. There are four elements to a claim under the "attempt to monopolize" provision of Section 2 of the Sherman Act:

(a) Specific intent to control prices or destroy competition with respect to a part of commerce; (b) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; (c) a dangerous probability of success; and (d) causal antitrust injury. *California Computer Products, Inc.* v. *International Business Machines Corp.*, ...F.2d...., 5 Trade Reg. Rep. (CCH) ¶62,713, p. 77, 970 (9th Cir., Docket No. 77-1563 (June 21, 1979)); *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977).

24. With respect to the first element of a Sherman Act Section 2 "attempt to monopolize" claim, intent may be inferred from proof of illegal predatory conduct, the second element necessary to establish an "attempt to monopolize" claim. See, *Hallmark Industry* v. *Reynolds Metal Co.*, 489 F.2d 8 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974).

25. FOREMOST, in support of its claim that QANTAS attempted to monopolize in violation of Section 2 of the Sherman Act, offered evidence that QANTAS had engaged in a number of acts of allegedly predatory conduct.

26. On the facts found on all of the evidence in the case, the Court concludes that during its business relationship with FOREMOST, which terminated March 31, 1974, there was no unlawful, predatory or anticompetitive conduct on the part of QANTAS in general or in its negotiations with FOREMOST

concerning the proposed purchase of a controlling interest in Royal Road Tours, Inc., or in the termination of its business relationship with FOREMOST.

27. On the facts found on all of the evidence in the case, the Court concludes that, during its business relationship with FOREMOST prior to March 31, 1974, QANTAS did not, with any anticompetitive or predatory intent, seek and receive valuable business information, confidential or otherwise, from FOREMOST. FOREMOST did not claim (and did not establish by any probative evidence) that any business data, sales reports or training materials furnished to QANTAS by FOREMOST were trade secrets, confidential business information or information entitled to similar proprietary protection.

28. On the facts found on all of the evidence in the case, the Court concludes that there was no unlawful, predatory or anticompetitive conduct on the part of QANTAS in its dealings with land component suppliers.

29. On the facts found on all of the evidence in the case, the Court concludes that QANTAS engaged in no unlawful, predatory or anticompetitive conduct in the format and contents of tour brochures QANTAS used to promote and hold out its tours to the public for sale. QANTAS brochures were dissimilar to FOREMOST's prior (pre-1974-1975) and competing (1974-1975) brochures. QANTAS' brochures clearly identified QANTAS as the operator of the QANTAS inclusive air tours to the South Pacific when they came on the market on April 1, 1974. At no time did QANTAS promote its tours as Royal Road Tours, a name identified with FOREMOST. There was no reasonable likelihood of confusion by a tour

purchaser between competing QANTAS and FOREMOST brochures during the 1974-1975 tour year. The similarity of tour components is to be expected in the market place and in no way evidences predatory intent or conduct on the part of QANTAS. QANTAS' brochures neither in format nor content evidenced predatory or anticompetitive intent.

30. On the facts found on all of the evidence, the Court concludes that QANTAS did not divert prospective FOREMOST tour passengers to QANTAS and did not, with anticompetitive and predatory intent, attempt to do so. That QANTAS advised persons, inquiring about FOREMOST's Royal Road Tours, that QANTAS had a tour program of its own, and that QANTAS mailed such persons QANTAS brochures, was not unlawful, anticompetitive or predatory. It was not unlawful, anticompetitive or predatory for QANTAS to promote its own product to potential customers who called to inquire about a rival product.

31. On the facts found on all of the evidence, the Court concludes that QANTAS did not engage in any predatory or anticompetitive conduct in its dealings with FOREMOST in the block booking of FOREMOST passengers on QANTAS aircraft after the termination of the FOREMOST/QANTAS business relationship.

32. On the facts found on all of the evidence, the Court concludes that no anticompetitive or predatory conduct or intent on the part of QANTAS can be inferred from the fact that the initial brochures of QANTAS' in-house inclusive air tours contained errors. There was no intent, predatory or otherwise,

on the part of QANTAS to misrepresent the contents or price of its tours by reason of the errors.

33. On the facts found on all of the evidence, the Court concludes that QANTAS did not engage in below-cost pricing of any of its tours in violation of Section 2 of the Sherman Act. No anticompetitive or predatory conduct can be inferred from the $805 10-Day fly/drive group tour offering to Australia, which was a legitimate tour offering and price leader to be sold at QANTAS' direct acquisition costs with no mark-up. Since United States dollars earned from the tours are not returned to Australia, it was proper and reasonable for QANTAS to use the rate of exchange applicable to conversion of Australian dollars to United States dollars in the costing of its tours. The election by QANTAS to use this rate of exchange was proper as a reasonable business judgment utilizing a legitimate economy of integration. No inference of predatory or anticompetitive conduct can be drawn from QANTAS' choice of this exchange rate in costing its tours.

34. QANTAS admitted that it supplied the land portion of its tours to its customers at their actual cost of acquisition, and that no airline administrative expenses incurred in packaging and producing the land portion of the tours was charged to its passengers. The Court is persuaded that some measure of administrative expense properly allocable to the land tour operation should be included in any computation of profit or loss resulting from such operation. If the strict Areeda-Turner analysis adopted by the Ninth Circuit is applied, it would appear that Qantas has provided the land portion of its tours at below its average variable costs. *Janich Bros., Inc.* v.

American Distilling Co., 570 F.2d 848 (9th Cir. 1977); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 687 (1975).

35. However, in the industrial setting of this case, QANTAS' failure to allocate administrative costs to the land portion of its tours did not constitute predatory pricing or evidence predatory intent, as these terms are applied under the Sherman Act.

36. Pricing is predatory only where the antitrust defendant firm foregoes short term profits in order to develop a market position for a product in which the firm can, among other monopoly benefits, later raise prices and recoup lost profits. The product must be such that, if predatorily priced, rivals are likely to be driven out of the market or excluded. *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977). In this case, QANTAS did not forego short term profits but realized significant profits from the sale of the land contents of their inclusive air tours, even if the Court-ordered markup for administrative and overhead expenses is disregarded. FOREMOST was not driven out of business and did not sustain any tangible recoverable damage by QANTAS' pricing of its tours.

37. More importantly, there was no injury to competition or to competitive conditions as a result of QANTAS' pricing of its tours.

38. There was little evidence that QANTAS, in offering its tours, had any predatory intent directed toward FOREMOST or anyone else. QANTAS is an international airline carrier engaged in the business of selling air transportation. The inclusive tour con-

cept by which land transportation and accommodations are furnished at cost to customers of QANTAS who purchase air transportation is conceived of by QANTAS as a promotional program to sell airline seats, which is the real profit incentive behind the tour offerings at issue. Given the profitability of the tours and the profit incentive behind the tour offerings of QANTAS, the significance of the administrative expenses involved in the land portion of the tours is *de minimis*.

39. Plaintiff argues that it would be contrary to Sherman Act principles to permit a member of a comprehensively regulated industry, such as QANTAS, which enjoys profits from a governmentally guaranteed rate structure, to use a portion of revenues earned from air fare to subsidize its endeavors in an unregulated sphere. QANTAS' pricing of its tours and its use of the inclusive tour air fares to cover the indirect and airline administrative costs of the wholesale tour operation is consistent with CAB economic and pricing policy and has been found by the CAB to be compatible with the public interest. Although this finding is not binding on this Court, the Court finds the CAB ruling persuasive. The Court, therefore, finds that the use by QANTAS of the inclusive tour air fares to cover the indirect and airline administrative costs related to the packaging of the land content of the tours was not contrary to the Sherman Act.

40. On the facts found on all of the evidence, the Court concludes that QANTAS had no intent, predatory or otherwise, to eliminate FOREMOST or any competitor from the wholesale tour business in the relevant market and engaged in no predatory, un-

lawful or anticompetitive conduct constituting an antitrust injury to FOREMOST or competition. QANTAS' entry into the wholesale tour market under the circumstances indicated neither was designed to effect nor resulted in an unreasonable restraint of trade within the relevant market at issue.

41. On the facts found on all of the evidence in the case, the Court concludes that no unlawful, predatory or anticompetitive conduct or intent can be inferred from the purchase and subsequent non-use of the Computour system by QANTAS. The evidence showed that there was simply a *bona fide* sale of the exclusive use of the Computour system to QANTAS by FOREMOST for $90,000.

42. The sole claim of FOREMOST of a violation by QANTAS of Section 1 of the Sherman Act upon which evidence was introduced was an alleged unlawful conspiracy between QANTAS and Canadian Pacific Airlines (CPAir) to eliminate FOREMOST as a competitor of QANTAS.

43. The elements of a claim arising under Section 1 of the Sherman Act are as follows:

(a) the existence of a combination or conspiracy;

(b) entered into by the parties in order to achieve monopoly power and effect an unreasonable restraint of trade; and

(c) causal antitrust injury. *Gough* v. *Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976).

44. The sole evidence of a combination or agreement between QANTAS and CPAir was a pooling

agreement involving a share of air fare revenues between Australia and Canada. On the facts found and on all of the evidence, the Court concludes that in the context of the relevant market and the alleged antitrust violations of FOREMOST, the pooling agreement between QANTAS and CPAir was not a conspiracy or combination in violation of Section 1 of the Sherman Act. The pooling agreement had no direct or indirect effect in the relevant product market in this case, as it dealt solely with air fare revenues and air transportation.

The pooling agreement was entered into by QANTAS and CPAir to share air transportation revenues between Canada and Australia and was not entered into by the parties to achieve monopoly power and to effect an unreasonable restraint of trade. The pooling agreement did not bring about a monopoly position to either CPAir or QANTAS, singly or in combination, and did not constitute an unreasonable restraint of trade affecting the relevant market.

45. The pooling agreement had no anticompetitive effect or impact on FOREMOST's relationship to QANTAS before or after March 31, 1974 or FOREMOST's efforts to enlist CPAir as its sponsoring carrier or on FOREMOST's competitive position in the relevant market.

FOREMOST enlisted Air New Zealand as its sponsoring carrier immediately upon the termination of the QANTAS-FOREMOST business relationship. FOREMOST was unable to show any antitrust injury caused directly or indirectly by the pooling agreement.

46. FOREMOST also claimed that QANTAS' participation in IATA constituted a conspiracy or combination in violation of Section 1 of the Sherman Act. FOREMOST produced no evidence in support of that claim.

47. FOREMOST in its Complaint alleged that QANTAS engaged in anticompetitive predatory conduct by disparaging FOREMOST and its product, interfering with FOREMOST contracts, attempting to steal key employees of FOREMOST, encouraging FOREMOST to neglect other business opportunities, falsely assuring FOREMOST of continued support by QANTAS of FOREMOST's programs and securing tour business through means prohibited to FOREMOST by IATA resolutions. No probative evidence was introduced in support of these allegations. On all of the evidence in the case, the Court concludes that FOREMOST failed to meet its burden of showing that QANTAS engaged in these acts.

48. On the facts found on the basis of the evidence, FOREMOST has failed to establish that QANTAS in any manner was in violation of Sections 1 or 2 of the Sherman Act.

49. For all of these reasons, FOREMOST's action for monetary damages shall be dismissed with prejudice, with costs to be awarded to defendant QANTAS; and the preliminary injunction previously entered shall be permanently vacated, with costs to be awarded to defendant QANTAS.

50. QANTAS, in this action, asserted a counterclaim against FOREMOST in its Amended Answer of September 10, 1974. This counterclaim stated six causes of action, four of which alleged acts of unfair

competition and violations of resolutions of the International Air Transport Association (IATA) which have the force of law under the Federal Aviation Act, 49 U.S.C. §1301, *et seq.* and two causes which claim breach of contract.

51. QANTAS apparently elected to abandon its claims against FOREMOST as no argument regarding them was offered by QANTAS and little evidence was introduced relating directly thereto. Although certain evidence adduced at trial in connection with FOREMOST's case and QANTAS' defense has inferential significance as regards QANTAS' counterclaims, such evidence failed to establish the counterclaim in this case. Accordingly, the counterclaim of QANTAS will be dismissed without costs.

Dated: Los Angeles, California
October 16, 1979

Jesse W. Curtis
United States District Judge

Appendix E

SHERMAN ACT SECTIONS I AND II, 15 U.S.C. SECTIONS I AND II

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.

Opposition

Office - Supreme Court, U.S.
FILED
SEP 16 1981
ALEXANDER L. STEVAS
CLERK

No. 81-426

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FOREMOST INTERNATIONAL TOURS, INC.,

Petitioner,

v.

QANTAS AIRWAYS LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

GEORGE N. TOMPKINS, JR.
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

Counsel for Respondent
QANTAS AIRWAYS LIMITED

Question Presented

The question as presented by the Petition does not derive from the proceedings in the courts below. This case involves nothing more than a matter of factual proof. The District Court found at the conclusion of a non-jury trial that Petitioner had failed to prove any of the allegations in its antitrust complaint and concluded that judgment should be for Respondent dismissing the complaint. After reviewing the record, the Court of Appeals held that the findings of the District Court were not clearly erroneous and affirmed the judgment dismissing the complaint.

Thus, the only question that might be raised by the Petition is:

Whether the Court of Appeals was correct in affirming as not clearly erroneous the findings of fact and the conclusions of law of the District Court that Petitioner had failed to prove any facts in support of its allegations of violations by Respondent of Sections 1 and 2 of the Sherman Act and that judgment should be for Respondent dismissing the complaint?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Qantas Airways Limited (Qantas), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit's Opinion in this case.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears as Appendix B to the Petition. The opinion of the District Court is reported at 478 F.Supp. 589 (D.Hawaii 1979) and appears as Appendix C to the Petition. The findings of fact and conclusions of law of the District Court appear as Appendix D to the Petition.

Prior proceedings in the case relating to the grant of a limited preliminary injunction are reported at 379 F.Supp. 88 (D.Hawaii 1974), *aff'd*, 525 F.2d 281 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

The Opinion and Order of the Civil Aeronautics Board (CAB), disposing of issues referred to the CAB by the District Court initially in 1974 when the preliminary injunction was granted, is not reported but appears as Appendix A to this Brief in Opposition.

Jurisdiction

The opinion of the Court of Appeals was filed on April 13, 1981. A timely petition for rehearing and suggestion for rehearing en banc were rejected by the Court of Appeals in an order filed June 3, 1981. This order appears as Appendix A to the Petition. Jurisdiction is invoked under 28 U.S.C. 1254(1) and 2101(c).

Statute Involved

The statute involved is the Sherman Act, Sections 1 and 2. They appear as Appendix E to the Petition.

Statement of the Case

The Petition does not set forth any statement of the case containing the facts material to the consideration of the question presented by the Petition. This alone should be a sufficient reason for denying the Petition. See Rule 21.5. Respondent deems it necessary, therefore, to set forth a detailed statement of the case containing the complete history of the prior proceedings and the underlying facts in order to assist the Court in determining that the Petition

for a Writ of Certiorari should be denied as urged by Respondent.

This is a Sherman Act antitrust action brought by Petitioner Foremost International Tours, Inc. (hereinafter Foremost), an independent tour wholesaler, against Qantas, a regulated foreign air carrier. Foremost is in the business of producing land tour packages as a part of inclusive air tours which are marketed to the public under the sponsorship of an airline. After terminating its sponsorship of a series of Foremost tours, Qantas decided to produce its own land tour packages in competition with Foremost. Foremost alleged in this action that Qantas, in the course of entering the tour wholesale market by packaging its own inclusive air tours, had engaged in predatory acts in violation of the antitrust laws, had monopolized the tour wholesale market to the South Pacific, had attempted to monopolize the market and had conspired with others to do so.

Foremost filed its complaint in the District of Hawaii on May 30, 1974 seeking injunctive and monetary relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. 15, 26 (1914) for alleged violations by Qantas of Sections 1 and 2 of the Sherman Act. 15 U.S.C. 1, 2 (1974).

After a brief evidentiary hearing in June, 1974, the District Court granted in part Foremost's motion for a preliminary injunction, restraining and enjoining Qantas from selling its inclusive "free-wheeling" tours until it had satisfied the Court that the portion of the tour price applicable to the land package costs included not only the actual costs charged to Qantas for the land services by the suppliers thereof, but also the administrative expenses, salaries and general in-house expenses of Qantas allocable to the land portion of the inclusive air tours. *Foremost Interna-*

tional Tours, Inc. v. *Qantas Airways, Ltd.*, 379 F. Supp. 88, 98-99 (D. Hawaii 1974).[1]

At the same time that the preliminary injunction was issued, the District Court stayed further proceedings in the case, "pending review, consideration, determination and findings by the CAB" under the doctrine of primary jurisdiction, while retaining antitrust jurisdiction. *Foremost*, 379 F. Supp. at 98.

The referral by the District Court to the CAB was affirmed by the Court of Appeals. *Foremost*, 525 F.2d 281 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976). The Court of Appeals held that, while the CAB did not have exclusive jurisdiction over the inter-industry dispute involved in the case, the controversy nevertheless should first be referred to the CAB since a regulated industry was involved and some of the issues in the antitrust action involved matters within the special expertise of the CAB. The Court of Appeals held further that the District Court should retain antitrust jurisdiction to determine whether the acts of the regulated airline had any anticompetitive effects on the unregulated wholesale tour industry.

Following a full evidentiary and adversary hearing upon the complaint of Foremost, which mirrored the complaint in this action, CAB Administrative Law Judge Argerakis issued his Initial Decision resolving virtually all factual and legal issues in favor of Qantas and against Foremost and the CAB's Bureau of Enforcement, which also was a party to the proceeding.

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[1] *Aff'd*, 525 F.2d 281 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976). Due to the repeated references to the earlier proceedings in this case, further references to the prior decisions of the District Court and the Court of Appeals will simply be to "*Foremost*" followed by the relevant citation to the court concerned.

Foremost and the Bureau of Enforcement filed petitions for discretionary review with the CAB seeking reversal of the Initial Decision. The CAB unanimously affirmed the findings and conclusions of Administrative Law Judge Argerakis in Order 78-10-129, dated October 26, 1978. The CAB found that all of the activities of Qantas complained of by Foremost were lawful under the Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.*, and that Qantas, in entering the tour wholesale market, had no predatory intent, monopolistic intent or any intent other than to compete effectively in the market. See Appendix A to this Brief in Opposition.

Neither Foremost nor the Bureau of Enforcement sought judicial review of Order 78-10-129 in a Court of Appeals, as provided in Section 1006 of the Federal Aviation Act of 1958, 49 U.S.C. 1486.

Following the issuance of Order 78-10-129 by the CAB, Qantas moved in the District Court for summary judgment dismissing the antitrust complaint upon the ground that the District Court was bound by the findings of the CAB and could not relitigate the matters actually disposed of by the CAB in Order 78-10-129. Qantas also moved in the District Court for an order vacating permanently the preliminary injunction previously granted by the District Court in 1974 with respect to the matters subsequently resolved in favor of Qantas by the CAB in the enforcement proceeding.

A hearing on these motions was held on January 4, 1979 after Order 78-10-129 had become final. Following oral argument, the District Court denied Qantas' motions in an oral ruling from the bench.

Qantas then filed a Petition for Writ of Mandamus or of Prohibition, For Temporary Stay Order and For Other

Appropriate Relief with the Court of Appeals on January 22, 1979. This Petition was denied without opinion in an Order dated March 20, 1979. Qantas then sought relief in this Court which was denied on March 24, 1979. The Order of this Court appears as Appendix B to this Brief in Opposition.

Prior to trial in the District Court, Foremost moved for summary judgment and Qantas filed a motion for an order, under the doctrine of *res judicata*, estopping Foremost from relitigating any factual issues which were fully litigated and finally disposed of by the CAB in Order 78-10-129.

Both motions were denied but the District Court did decide to give *res judicata* effect to four findings made by the CAB. Thereafter, the trial commenced and all of the factual issues were relitigated under applicable antitrust principles.

In denying Foremost's motion for summary judgment and Qantas' motion to give *res judicata* effect to all of the CAB findings and conclusions, shortly prior to trial, the District Court stated, in its Memorandum and Order of April 6, 1979:

> Thus, there remain in issue questions involving the alleged below cost pricing of the land portion of the tours, and the extent to which these costs as well as the indirect administrative expenses of the tours under Sherman Act analysis were properly recovered from the airfares charged, notwithstanding the fact that the fares conformed to the CAB tariffs. In addition, there remain to be determined similar questions of fact, for example alleged "bait and switch" tactics by Qantas, its misappropriation of the plaintiff's tour business, misrepresentations on the brochures advertising Qantas' tours and the extent to which such

> brochures so closely copied the plaintiff's as to mislead the public into believing the two tours were provided by the same entity. As discussed above, all of these questions and others remain in suit because they are relevant as to a predatory intent by Qantas in connection with an alleged attempt to monopolize the land portion of the tours at issue. As discussed above, these issues which address alleged Sherman Act violations occurring outside the regulatory sphere of the CAB could not be properly resolved by that body and therefore must be tried in this court.

Memorandum and Order dated April 6, 1979, p. 10. See Appendix C to this Brief.

The non-jury trial on the issue of liability under the antitrust laws thereafter commenced on April 11, 1979 and concluded on April 25, 1979.

At the trial, Foremost sought to establish that Qantas had predatorily priced its tours "below cost", attempted to assume the identity of Foremost by copying component elements of Foremost tours, copied Foremost brochures and failed to distinguish the Qantas Holidays Tours from the Foremost Royal Road Tours. Further, Foremost sought to establish that Qantas misappropriated Foremost's business by switching tour passengers and misinforming travel agents regarding the business existence of Foremost and the availability of Foremost tours. Foremost also charged Qantas with attempting to foreclose Foremost from competing in the market by allegedly refusing to reserve space for Foremost passengers on Qantas flights in December, 1974, by allegedly securing tour business through means prohibited to Foremost by IATA resolutions, by allegedly refusing to use a system owned by Qantas which had been developed by Foremost and was known as "Computour," by allegedly eliminating CPAir as a source of tour business

to Foremost and by allegedly offering for sale nonexistent or false tours.

Foremost further sought to establish that Qantas engaged in other unlawful predatory practices including entering into ultimately unsuccessful negotiations to purchase Foremost, securing confidential information, effecting the training of Qantas personnel by Foremost and causing misleading printing errors in the first edition of the Qantas Holiday tour brochures effective from April 1, 1974.

Finally, Foremost sought to establish that Qantas engaged in an unlawful conspiracy in restraint of trade with another air carrier, Canadian Pacific Airlines Limited (hereinafter CPAir), in violation of the Sherman Act.

At the conclusion of the trial, the District Court found, upon all of the evidence in the case, that Foremost had failed to prove any of the antitrust violations alleged in the complaint and granted judgment for Qantas. The Court of Appeals, upon a review of the record, held that the findings and conclusions of the District Court were not clearly erroneous and affirmed the judgment for Qantas. Fed. R. Civ. P. 52(a).

Reasons Why The Writ Should Be Denied

1. *Neither the decision below nor the record raises the Question Presented in the Petition.*

Petitioner continues to mischaracterize this case as one in which some form of antitrust immunity was granted Respondent by the CAB under the Federal Aviation Act of 1958[2] with respect to the allegations of antitrust violations contained in the complaint. See Petition, pp. 2-25.

[2] 49 U.S.C. 1301 *et seq.*

Nothing could be further from reality. Had any antitrust immunity been conferred upon Respondent the trial in the District Court, which resulted in a judgment for Respondent, would not have taken place or at least would have been severely curtailed.

This case presents a textbook example of the proper accommodation between the antitrust court and an administrative agency (CAB) where the allegations in the complaint transcend both the antitrust laws and the unfair competition provisions of the Federal Aviation Act of 1958. The District Court initially granted a preliminary injunction to maintain the status quo, pending initial determination by the CAB of the unfair competition allegations which fell within the special expertise of the CAB, while at the same time retaining antitrust jurisdiction of the controversy. The CAB took jurisdiction of the matter and, after an evidentiary and adjudicatory proceeding, concluded that Respondent had not engaged in any unfair methods of competition in violation of the Federal Aviation Act of 1958 as alleged by Petitioner.

The case then returned to the antitrust court. Despite the repeated urgings of Respondent, the antitrust court refused to confer any immunity from the antitrust laws upon Respondent based upon the findings and conclusions of the CAB that Respondent had not engaged in any unfair methods of competition under the Federal Aviation Act of 1958. The antitrust court then proceeded to receive evidence and to adjudicate the conduct of Respondent under applicable antitrust standards in a non-jury trial. Applying these standards to the proof offered by Petitioner, the District Court concluded that Respondent had not violated the antitrust laws in any respect and dismissed the complaint. The Court of Appeals, upon a review of the record and applying the clearly erroneous standard of re-

view,[3] affirmed the judgment of the District Court dismissing the complaint.

Clearly the record in this case shows beyond question that no antitrust immunity was granted Respondent in any respect concerning the allegations in the complaint. The Question Presented by the Petition simply does not arise from the decision below or from the long record of this case.

2. *Only questions of evidence and factual findings could be involved in this case.*

This case involves nothing more than a simple case of the adequacy of the proof offered at the trial by Petitioner to support the allegations of antitrust violations. After a thorough and careful consideration of the entire evidentiary record, the District Court concluded that Petitioner had failed to prove the alleged violations of the antitrust laws contained in the complaint and, therefore, granted judgment to Respondent. The Court of Appeals fully considered the record on appeal and correctly decided that the judgment of the District Court was not clearly erroneous. The judgment for Respondent accordingly was affirmed. The Petition does not raise any issues with respect to the sufficiency of the evidence, the admission or the exclusion of evidence, that any of the findings of fact of the District Court are not supported by the evidence of record or that incorrect antitrust principles were applied to the evidence.

3. *There is no conflict with any other Circuit caused by the decision of the Court of Appeals.*

The Petition feebly attempts to create a conflict between the Court of Appeals for the Ninth and Third Circuits on

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[3] Fed. R. Civ. P. 52(a).

the subject of whether market definition and share must be established in order to support a claim of an attempt to monopolize. It is argued that the Ninth Circuit does not require such a showing but that the Third Circuit does and the Petition cites decisions from both circuits indicating the two different approaches relied upon. See Petition, pp. 25-29. Even if the cited cases are read as being in conflict on this point, this "conflict" is a philosophical and academic one only and has absolutely nothing to do with this case or the decision of the Court below. Petitioner's market definition was accepted by the trial court and even though no evidence of Respondent's share of this market was offered by Petitioner, the trial court nevertheless considered whether the evidence that was offered supported the charge of monopolization and attempt to monopolize and found, upon all of the evidence, that the evidence did not support the allegations. The Court of Appeals, upon a review of the record, held that the District Court was not clearly erroneous.

The decision below presents no conflict with the decision of any other Circuit or any prior decision of this Court. This case involves simply questions of factual proof and nothing more. Clearly, the issues resolved by the Court below are not substantial, significant, or important enough to warrant review by this Court. Additionally, since the Court of Appeals reviewed the record and correctly applied the requisite clearly erroneous standard of review, the decision of the Court below clearly is correct and there is no need for further review by this Court since no error has been committed.

The Petition presents no special or important reason why further review of this case should be granted by this Court. This is a simple case of the failure of Petitioner to prove factually the allegations in its complaint either before the CAB or the antitrust trial court.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

/s/ George N. Tompkins, Jr.

George N. Tompkins, Jr.
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

Counsel for Respondent
Qantas Airways Limited

Of Counsel

Michael J. Holland
Condon & Forsyth

Certificate of Service

I hereby certify that I have this 14th day of September, 1981 served the foregoing Respondent's Brief in Opposition upon Petitioner by mailing, first class postage prepaid, three (3) copies thereof to Counsel for Petitioner, Alexander Anolik, Esq., 693 Sutter Street, Sixth Floor, San Francisco, California 94102.

/s/ George N. Tompkins, Jr.

George N. Tompkins, Jr.
Counsel for Respondent
1251 Avenue of the Americas
New York, New York 10020

APPENDIX

APPENDIX A

Order 78-10-129

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 26th day of October, 1978

Docket 27631

FOREMOST INTERNATIONAL TOURS, INC.,

v.

QANTAS AIRWAYS, LIMITED,

Enforcement Proceeding

ORDER ON PETITIONS FOR DISCRETIONARY
REVIEW OF INITIAL DECISION

This proceeding grew out of an antitrust suit filed by Foremost International Tours (Foremost) against Qantas Airways (Qantas) in a federal district court. Foremost's suit charged that Qantas was violating the antitrust laws in its packaging and marketing of inclusive tour programs to Australia and New Zealand in competition with Foremost, a tour wholesaler. The court held that some of the complaint's charges were within the Board's primary jurisdiction; therefore, the court stayed further court proceedings on them pending the Board's resolution of those charges. *Foremost International Tours* v. *Qantas Airways*,

Appendix A

379 F. Supp. 88 (D.C.D. Hawaii, 1974), *aff'd*, 525 F.2d 281 (C.A. 9, 1975), *cert. denied*, 429 U.S. 816.[1]

Foremost, accordingly, filed a third-party complaint with the Board, which the Bureau of Enforcement (now Bureau of Consumer Protection) docketed in part. After a hearing, Administrative Law Judge Alexander N. Argerakis found that Qantas had engaged in unfair and deceptive practices under Section 411 of the Federal Aviation Act, 49 U.S.C. 1381, by distributing tour brochures containing a number of factual errors. He determined, however, that Qantas had not otherwise violated section 411. He further found that the record did not support the allegations in the complaint that, by below-cost pricing of the land accommodations portion of the tours, Qantas had violated the antirebating provisions of the Act (section 403(b), 49 U.S.C. 1373(b)), and had engaged in unjust discrimination in violation of section 404(b), 49 U.S.C. 1374(b). Foremost and the Bureau, but not Qantas, have requested discretionary review of the initial decision.[2] Qantas opposes their request.

While we are in general agreement with the conclusions of the initial decision, we have decided to grant review because some of the issues warrant further analysis. Under Rule 28 of the Board's Rules of Practice we will dispense with further procedural steps since we find they would serve no useful purpose. The initial decision is attached to this order and, except to the extent modified by us, its findings and conclusions are adopted as our order.

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[1] The district court did issue a preliminary injunction against Qantas, however.

[2] Foremost also filed a motion for expeditious treatment of its petition for discretionary review, which will be denied as moot.

Appendix A

Background

This case concerns the competition between Foremost, an independent tour wholesaler, and Qantas in the sale of inclusive tours for travel from the United States to Australia and New Zealand.[3] Those tours, operated under Board-approved resolutions of the International Air Transport Association, consist of air transportation on a regularly scheduled flight plus a package of land arrangements including hotel accommodations, local transportation (such as a rental car) and sight-seeing trips. See Order 78-3-34, *supra*, pp. 1-2. The airfare used for these tours is a "tour-basing" fare that is lower than the regular economy airfare. The low fare's purpose is to attract passengers who would not travel at all if forced to pay the regular fare. Under the IATA resolutions then in effect, the land package had to include hotel accommodations for each night of the tour and at least one other feature. The IATA resolutions further specified a minimum price for the land package based on the length of the tour.

As a wholesaler, Foremost puts together tour packages, under the Royal Road Tours trade name, which are sold to the public by travel agents, not Foremost. However, under the IATA resolutions, inclusive tours like those at issue can be sold only if sponsored by an IATA member carrier. For several years before March 31, 1974, Qantas had been the principal sponsoring carrier for Foremost's

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[3] In an earlier proceeding Qantas filed a complaint against Foremost and Air New Zealand, the IATA carrier now sponsoring Foremost's tours. That case also involved their competition in the South Pacific tour market. We affirmed the Bureau's dismissal of Qantas' complaint. Order 78-3-34 (March 9, 1978).

South Pacific tours. On April 1, 1974, however, Qantas began packaging and selling such tours through its in-house tour wholesaling division. Foremost's tours have since been sponsored by Air New Zealand.

The Board has held that the "in-house" packaging and selling of inclusive tours by scheduled carriers "appears basically to be vigorous competition offering low-cost service to the public," and rejected arguments that such services, without a showing of predatory intent or other unlawful practices, constitute an unwarranted intrusion on the operations of independent tour operators.[4]

Alleged Violations

Foremost's petition for review asserts that the ALJ should have found that the following acts by Qantas were unlawful:

(1) At least some of Qantas' tours were sold in violation of sections 403(b) and 404(b), because their land package's price did not cover its real cost, with the result that part of the airfare was diverted to cover the land packages costs;

(2) One Qantas tour was part of a "bait and switch" scheme;

(3) Qantas unlawfully preferred its in-house tour operation in reserving aircraft space at peak seasons;

(4) Qantas committed an unfair competitive practice by disparaging Foremost's tours and misappropriating tour business intended for Foremost; and

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[4] See *United States Tour Operators Association, Inc.*, Order 77-3-140 (March 24, 1977), at pp. 3-4, denying reconsideration of Order 76-12-101 (December 16, 1976).

(5) Qantas engaged in an unfair and deceptive method of competition by using brochures which closely resembled those previously used by Foremost.

While the Bureau's petition for review repeats Foremost's charges, it, unlike Foremost, essentially argues that those and other examples of alleged misconduct by Qantas show that the carrier was unlawfully trying to eliminate Foremost from the tour wholesaling business.

As discussed below, we agree with the initial decision's determination that these allegations are not supported by the record or in law.

Below-cost Pricing

Foremost and the Bureau do not contend that Qantas sold its tours at any price other than that specified in Qantas' tariffs or tour brochures, and the Board-approved IATA resolutions governing inclusive tours which, as stated, require that the price of the land portion of the tour exceed a specified limit. Instead, they contend that Qantas violated sections 403(b) and 404(b) because the land portion of the carrier's tours allegedly was sold below its cost. Accordingly, the airfare assertedly was used in part to cover the cost of the land package, which meant that Qantas' tour participants paid less for their air transportation than they should have.

The ALJ, however, found that the prices of Qantas' land packages exceeded their direct costs, that is, the costs of the accommodations and other arrangements included in the tour packages. He also held that the indirect costs of the carrier's tour program, primarily the administrative costs of Qantas' in-house tour operation, were permissibly covered by the tour-basing airfare and did not need to be covered by the price of the land package. While Foremost

and the Bureau challenge these conclusions, we agree, as set forth below, with the ALJ's determinations.[5]

Initially, however, we disagree with the ALJ's findings on Qantas' use of an allegedly incorrect exchange rate.[6] Since Qantas' tour participants paid U.S. dollars for hotel accommodations and transportation furnished within Australia by vendors paid in Australian dollars, Qantas had to convert the U.S. dollar into Australian dollars for bookkeeping purposes. Qantas used the Australia Commonwealth Trading Bank (CTB) rate for converting Australian dollars into U.S. dollars, $1 (A) equalling $1.485 (U.S.). The ALJ reasoned that Qantas should have used CTB's quoted rate for converting U.S. dollars into Australian dollars, since the tour participants' payments had to be converted into Australian dollars to purchase the land arrangements in Australia. That rate would have brought Qantas fewer Australian dollars and, if used, Qantas' land packages would have been sold at less than their direct cost. According to Foremost, the losses ranged from $1.11 to $4.41 per tour, on tours priced at $805 to $1,285. The ALJ concluded that losses of this size were too small to be of any significance. He therefore refused to find that Qantas deliberately used an incorrect exchange rate as a rebating device. I.D., p. 34.[7]

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[5] Foremost argues that the ALJ should have found that an unusually low hotel rate used by Qantas to cost one of its tours, the $805 Australia group tour, was a fictitious rate. Foremost's petition for review, however, has not persuaded us that there is any error in the ALJ's reasoning. I.D., p. 28. Except for the exchange-rate issue, discussed below, Foremost otherwise does not challenge the ALJ's determination that Qantas' land packages were not sold below their direct cost.

[6] Unless otherwise stated, all monetary amounts used in this order are given in U.S. dollars.

[7] The estimated losses do not take into account the significant savings realized by Qantas from the failure of many tour partici-

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Foremost now argues that the ALJ's findings that Qantas failed to use the correct exchange rate mandate a conclusion that its tours' land packages were sold below their direct cost. We disagree, for, unlike the ALJ, we believe that Qantas in fact used a proper exchange rate. As Qantas points out, the record shows that the exchange rate was used only as a bookkeeping exercise. The U.S. dollars paid by tour participants were never converted into Australian dollars. Instead, they remained in the United States since Qantas uses U.S. currency for both operating purposes and the purchase of spare aircraft parts and other equipment. Qantas' other operations do not produce enough U.S. dollars to cover their needs, so Qantas has had to transfer other currencies to the United States for conversion into U.S. dollars. Tr. 1102-1103. Thus the rate used by Qantas reflected the benefit given the carrier to it by the tour program's production of U.S. currency. Foremost might protest that, since it has to convert the U.S. dollars it receives from tour participants into Australian dollars in order to cover the Australian ground costs of its own tours while Qantas does not have to do so, Foremost is placed at an unfair competitive advantage. The answer to that protest is that the two competitors' different situations reflect a legitimate economy of integration: Qantas does not have to incur those exchange conversion costs, while Foremost does. Surely Qantas should not be required to price above its actual costs in order to protect a less advantageously situated competitor. Accordingly, we find that Qantas' use of the

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pants to use all the features provided in their tour's land package. Tr. 1105, 1402. If these savings were included in Foremost's calculations, the tours would apparently be priced above their direct costs even if Foremost's argument on the proper exchange rate were correct.

selling rate of U.S. dollars was not unreasonable, and under that rate the record indicates that the price of the land package of each Qantas tour covered the direct costs of that package.[8]

As to the indirect and administrative costs incurred in the land portion of the tours, Qantas concedes that the prices of the land packages did not cover those costs. Qantas argues, however, that this does not result in a prohibited rebate of a portion of the airfare paid by the tour passenger. The ALJ agreed, noting that the airfare was large enough to cover those costs and the cost of the tour participant's air transportation. I.D., pp. 34-39. The ALJ ruled that a discount fare program did not have to cover fully allocated costs.[9]

In its petition for review Foremost argues that the tour-basing airfares are not intended to cover the administrative and overhead costs of an air carrier's tour business.[10] Foremost also argues that Qantas' use of the airfare to cover expenses of its tour department is analogous to the rebating activity condemned in *Hawaiian Airlines* v. *Aloha Airlines, Enforcement Proceeding*, Order 76-10-88 (October 20, 1976).[11]

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[8] Foremost's petition quotes a Qantas witness who testified that he would be willing to price one tour below cost if the carrier's profits on the other tours in the program offset that loss. Foremost, however, has failed to show that Qantas in fact priced any tour below the direct cost of its land arrangements.

[9] The ALJ cited Phase 5 of the *Domestic Passenger Fare Investigation*, I.D., p. 36.

[10] Foremost does not challenge the ALJ's finding that Qantas had shown that the airfare was large enough to pay for both the cost of air transportation and the indirect costs of the tour program. I.D., p. 37.

[11] Aloha's petition for review of that order is pending before the District of Columbia Circuit Court of Appeals, C.A.D.C. No. 76-2131.

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We find that Qantas' use of the airfare to pay for the indirect costs of its tour program here was not unlawful.[12] As indicated, Qantas is complying with its tariffs and the IATA resolutions, which require only that the land services exceed a specified minimum. Thus, Foremost is essentially arguing that the sale of any service at less than its fully-allocated cost means that the purchaser of that service is receiving a rebate, for his transportation can only be provided through the use of the proceeds of the carrier's other business. But, if carried to its logical conclusion, this argument would mean that any carrier would violate section 403(b) whenever its fares for one form of air transportation do not cover its fully allocated cost, even though the fares and the service provided conform to the carrier's tariff. Such a result would not carry out the purpose of the antirebating provisions of section 403(b), "to preclude discriminatory treatment among customers of air carriers," *United Air Lines, Exemption*, Order 76-3-30 (March 4, 1976), p. 3. Since Qantas has

[12] Foremost's argument that a rigid separation is required between the airfare and the land package's price appears to be inconsistent with Foremost's own practice. The current sponsor of Foremost's tour program, Air New Zealand, has been paying it up to $80 for each Foremost tour participant who travels between Los Angeles and Auckland or Sydney on Air New Zealand. Tr. 425-426. Since those payments presumably come out of the airfare received by Air New Zealand, Foremost's acceptance of them seems to be at odds with its assertion that Qantas may not use its airfare proceeds to cover the indirect expenses of its in-house tour operation.

Although the generally indirect costs at issue arose out of the administration of Qantas' tour program, rather than its ordinary airline operations, the tour program appears in large part intended to provide passengers for its South Pacific flights, rather than to operate as an independent part of Qantas' overall business. Since the tour program may be fairly construed as a means of promoting Qantas' airline traffic, its indirect costs may reasonably be attributed to the airline operation and thus payable from the airfare.

concededly followed the terms of its tariffs, the IATA resolutions, and its publicly distributed tour brochures, there is no showing of discriminatory treatment condemned by that section.[13]

Furthermore we believe that, subject to tariff requirements, section 403(b) should be read to leave such pricing decisions to a carrier's management because by doing so the public is more likely to get the benefit of competition and thus lower prices. If Qantas believes that its tour prices adequately cover its costs, then those prices should be permissible (absent predatory or discriminatory conduct or an attempt to monopolize), since Qantas has complied with its tariff. *See, e.g.*, Order 78-2-33 (February 3, 1978); *Peanut Fares Investigation*, Order 78-3-93 (March 22, 1978); Order 78-4-84 (April 14, 1978). Accordingly, we find no merit in Foremost's argument that section 403(b) requires Qantas to price its tours' land arrangements to cover the indirect costs of its inclusive tour operation.

We are equally unpersuaded by Foremost's assertion that Qantas' pricing of its tours constituted unjust discrimination in violation of section 404(b). Allegedly, Qantas' tour participants receive an unreasonable preference denied other Qantas passengers. As the ALJ pointed

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[13] Accordingly, Foremost's reliance on the *Aloha Airlines* enforcement proceeding is misplaced. There, Aloha was providing some passengers with discount car rentals made available by Aloha's payments to the car rental company. The discount car rentals were not included in Aloha's tariff, and no passenger receiving the discount car rental paid Aloha to offset its costs of the rental. Here, in contrast, Qantas' tour program complies with its tariffs, and the price of the land package exceeds direct costs. Thus, here, as in Order 78-3-34 at p. 3, "there is no suggestion that [the carrier] failed to charge any passenger the full tour price specified in the applicable tariff, including the price of the ground package."

out, however, Qantas priced the land packages of its tours in a manner consistent with the Board's past policy on discount fares. Thus the carrier's pricing policy is not unjustly discriminatory. Foremost, moreover, has failed to offer any explanation of why the carrier's pricing policy must be held unlawful under past Board and judicial interpretations of section 404(b).[14] Competitive pricing, moreover, is generally something to be encouraged.

"Bait and Switch"

Foremost argues that Qantas' $805 group tour to Australia, the lowest priced South Pacific tour offered by Qantas, was not designed to be sold and in fact was never sold. Furthermore, says Foremost, the Sydney hotel rate used to justify the tour's low price could be used only once, if at all. Qantas' advertising should have given notice of that limitation but did not. Accordingly, Foremost argues that the tour constituted an unlawful sales technique under the Federal Trade Commission's definition of "bait and switch," 16 C.F.R. 238.

The ALJ agreed that the $805 tour might have been "bait" designed to attract potential South Pacific travellers

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[14] Foremost's petition could be read as arguing that Qantas violated section 404(b) since its customers receive lower prices than those available from independent tour wholesalers (Pet., p. 12). Even if this assertion were factually correct (Air New Zealand, after all, supports Foremost's own program with sector payments), Qantas' ability to undersell Foremost cannot be considered a violation of section 404(b), for any prospective traveller to the South Pacific can buy a tour from Qantas. Underselling one's competitors is generally not precluded by Section 404(b) and in fact is something we find that usually benefits the traveling public.

If, however, we could find some basis for the Bureau's charge of attempted monopolization, then Qantas' pricing might support a finding of unlawful competition. As discussed below, the Bureau's charge is unsupported by the record.

to Qantas. He found no "switch," because nothing in the record suggested that Qantas had not tried to sell the tour or had discouraged prospective customers from buying that tour in place of a higher priced one. I.D. pp. 30-31. Foremost argues that the ALJ erred by refusing to infer the existence of "switch" from the fact that no $805 tour was sold, and relies on *Tashof* v. *FTC*, 437 F.2d 707 (C.A.D.C. 1970).

We agree with the ALJ. First, although the hotel rate used to cost the $805 tour was apparently available to only one group, there is no evidence to show that Qantas would have suspended sales of that tour after one sale.[15] Qantas, after all, could have continued selling the tour by finding another comparable hotel with similarly low rates, or by using the same hotel at its usual rates. Foremost has not shown that Qantas would have quit selling the $805 tour rather than adopt one of these alternatives.[16]

There is also no evidence that Qantas discouraged South Pacific travellers from buying the $805 tour or that it refused to sell it. The $805 tour, therefore, does not fit within the Federal Trade Commission's definition of a "bait and switch" tactic, even assuming that the tour could be construed as "bait." *See* 16 C.F.R. 238.3. Finally, the *Tashof* holding is inapplicable for the tour's relatively unattractive nature would explain why Qantas could not sell

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[15] We need not examine, however, Foremost's contention that the tour was intended solely as a "loss leader"; nor is there occasion to determine the circumstances, if any, in which such action standing alone could constitute unlawful pricing.

[16] As Foremost pointed out, one Qantas witness said he would be willing to sell one tour below cost if the whole program were profitable, *supra*, p. 5, n.8. This policy suggests that Qantas would continue selling the tour. See also Tr. 1522-1523.

it.[17] *Tashof*, in contrast, involved a satisfactory product which logically should have been purchased by many people. Thus, the few sales of that product led to the FTC's presumption of a "switch".[18]

Refusal to block space

Foremost asserts that Qantas engaged in an unfair competitive practice by not reserving blocks of seats for Foremost's inclusive tour passengers during the 1974 Christmas season. Block-space booking is an airline's commitment to a wholesale tour operator to reserve for it blocks of seats well in advance of tour departures. Such commitments are necessary for peak-demand periods, such as the Christmas season. Foremost claims that it had never had trouble getting blocked space on Qantas when Qantas sponsored its tours. In February, 1974, however, Qantas confirmed only 75 seats and wait-listed 225 when Foremost requested seats for the 1974 Christmas season. At the same time, moreover, Qantas reserved 832 seats for its own tour passengers, including 179 seats on December 13, 1974, a day for which Foremost's request for 125 seats was wait-listed. I.D., p. 45.

The ALJ found no evidence that Qantas' initial refusal to grant Foremost's blocked-space caused Foremost to lose

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[17] Here, the tour could only be sold if a group of ten travellers were formed. I.D., p. 16. Furthermore, the relatively short length of the tour (10 days) made it unattractive to North American travellers. Tr. 1521-1522. We note that there is no contention that these features of the tour were hidden by Qantas' brochures.

[18] Our finding that Qantas' $805 tour was not a "bait and switch" tactic does not mean we approve of a carrier's use of a low-priced service to attract business when the service is made so unattractive that few, if any, travellers would buy it.

any sale, or that Qantas' action made it impossible for any tour group to travel to the South Pacific during the 1974 Christmas season. He saw no reason to believe that Qantas wait-listed Foremost's request to give preference to its own tour program or that Qantas in any way purposely or unlawfully discriminated against Foremost's tour program. I.D., pp. 58-59.

Foremost's petition for review argues that Qantas unlawfully preferred its own in-house tour program, a practice which the Board warned against in *Kuoni Travel Limited,* Order 76-6-135 (served June 21, 1976).[19]

Our analysis indicates that Qantas did favor its own tour program over Foremost, but we decline to hold that such preference was an unfair competitive practice on the basis of this record. We note that Foremost only turned to Qantas for blocked space because neither its sponsoring carrier, Air New Zealand, nor the other South Pacific carriers could satisfy its anticipated need for blocked space.[20] In addition, Foremost failed to use the seats confirmed by Qantas and failed to show that Qantas' initial refusal to grant its blocked-space request caused it to lose any sales. See I.D., pp. 58-59.

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[19] Qantas' reply argues that Foremost's alleged competitive injury is irrelevant since section 411 is concerned with the public interest and not private rights. This argument is without merit. While Qantas correctly states that section 411 is concerned with the public interest, it errs in asserting that Foremost's alleged competitive injury is therefore irrelevant. Obviously injury to one competitor caused by another's unfair conduct is of public concern, for it undermines competition and favors monopoly. See *Pan American World Airways* v. *U.S.*, 371 U.S. 296, 306-307 (1963). In short, it hurts the public.

[20] A Foremost witness admitted that Foremost preferred to use Air New Zealand for its tour participants because of that carrier's payments to Foremost (*supra*, p. 6, n. 12). Tr. 592-593.

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Our conclusion is not altered by Foremost's claim that Qantas' conduct in 1974 was inconsistent with the carrier's willingness in earlier years to grant such requests from Foremost. Tr., 615. In those years, Qantas sponsored Foremost's tours and would logically give preference to its requests. Qantas' failure to continue such preferential treatment is not a basis for a finding of unfair competition, although a failure to treat independent tour operators equally could be if, unlike Foremost, they were competitively harmed by Qantas' favoritism for its own tour program.

Our refusal to hold Qantas' treatment of Foremost's blocked-space requests unlawful is supported by judicial decisions on the legality of boycotts under the antitrust laws. The courts have held that a single company may refuse to deal with a potential customer, at least as long as alternative sources of equivalent products are readily available and there is no attempt to monopolize. *Beverage Distributors* v. *Olympia Brewing Co.*, 440 F.2d 21, 32 (C.A. 9, 1971). That reasoning seems applicable here, for Foremost has an alternate source, Air New Zealand, which apparently satisfied its needs for seats without undue difficulty for Foremost. Moreover, the record does not indicate that Qantas' was trying to monopolize the South Pacific tour business.

We are mindful, however, that, unlike manufacturers, air carriers are common carriers. Furthermore, the entry of new carriers into the South Pacific markets is limited by governmental restraints not applicable to most lines of business. Accordingly, while we do not find that Qantas engaged in unfair competitive practices as far as Foremost is concerned, we are disturbed by its apparent discrimination against all independent travel wholesalers in favor

of its own tour program.[21] Qantas thus blocked space for its own tour program while simultaneously wait-listing most of the confirmed space requests made by persons outside Qantas. For example, it reserved 179 seats on its December 13, 1974 flight while wait-listing Foremost's request. Tr. 1293. The carrier's tour program, moreover, ultimately used none of those seats. Tr. 1291-1293.

We can understand that a carrier would want to limit the amount of blocked space on its flights, for seats sold by tour wholesalers at discount fares will produce less revenue. Furthermore, when blocked space is used at peak seasons by tour participants, travellers willing to pay the regular scheduled fare may be unable to obtain seats. In addition, if a tour operator fails to use its blocked space the carrier bears the loss. Tr. 602. Nonetheless, we see no apparent justification for Qantas' confirming large numbers of seats for its own tour program while turning down in whole or in part requests by others for space. Accordingly, if the Bureau believes that Qantas (or any other carrier) is engaged in such practices, it may wish to consider instituting an enforcement proceeding against it. Such a proceeding could provide a thorough examination of the carrier's treatment of blocked-space requests, and the justification for such treatment.

Disparagement of Foremost

Foremost's assertion that Qantas employees disparaged Foremost and attempted to take away business rightfully belonging to Foremost is based upon phone calls made by various persons in May, 1974, at Foremost's request, as

[21] As Foremost says, the concerns we expressed about carrier favoritism in *Kuoni* are applicable to Qantas' conduct. They do not provide a basis for granting Foremost's petition, however, for it had a presumably sympathetic source for blocked space.

part of its effort to obtain evidence for its district court suit. The telephone calls were made to Qantas agents, and the callers requested information about Royal Road Tours (a Foremost program) to Australia and New Zealand.[22] The callers were told that Royal Road Tours did not exist, or that Qantas no longer sponsored the Royal Road program, or that Qantas had its own tour program which was less expensive than Royal Road Tours. Each caller requested Royal Road tour brochures and instead was sent Qantas tour brochures. One witness, a travel agent, called Qantas to book a Royal Road tour and she was given instead a Qantas tour booking. I.D., p. 48.

The ALJ determined that this evidence failed to establish an unfair competitive practice. The calls were made after the validity of Foremost's previous brochures had expired and before its new brochures were ready. I.D., p. 49.[23] Furthermore, the ALJ reasoned that the travel agent who wanted to book a Royal Road tour knew that the agent had booked a Qantas tour for her. Finally, he relied upon evidence that Qantas' management had instructed its employees to refer inquiries about Royal Road tours to Foremost. I.D., pp. 48, 49.

We affirm the ALJ. Foremost's contention that Qantas misappropriated customers is predicated on the assumption that the customers associated Royal Road Tours exclusively with Foremost. Foremost had no brochures for the tours available for the public, and the previous brochures named

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[22] Some of the calls were made to Air New Zealand and British Airways after 6 p.m., a time when Qantas agents handled those carriers' calls in Honolulu. Tr. 687.

[23] The validity of the previous year's brochures expired March 31, 1974, the same date that Qantas sponsorship of Foremost's tours terminated. The new Royal Road brochures were not available until June or July, 1974. The old brochures could not be used to sell tours. Tr. 286.

Qantas and Air New Zealand as the sponsoring carriers. A Bureau witness, as indicated below, testified that the public identified a tour program with the sponsoring carrier, not the tour operator. Accordingly, a Qantas agent could reasonably assume that members of the public who inquired about the Royal Road tours at that time might want a Qantas tour, not a Foremost tour.

In any event, if prospective travellers choose to call up Qantas, we see no reason why Qantas should not try to sell them a Qantas tour. See I.D., p. 60. The brochures sent the callers, moreover, clearly concerned Qantas tours, not Royal Road Tours, so they could not mislead inquirers into believing that Qantas was selling them a Foremost tour.

We are equally unpersuaded by Foremost's claim of disparagement. Foremost relies upon one Qantas agent's statement that Royal Road tours no longer existed. Tr. 685. We doubt that this one isolated statement— given in violation of management's instructions—could support a finding of unfair competition even if it were entirely false. But in fact the previous Royal Road program, in which Qantas participated, did no longer exist. Moreover, there were no new Royal Road brochures available. Finally, the agent did advise the caller that Air New Zealand had its own tour program—a program operated by Foremost. The Foremost caller, moreover, failed to follow up this advice by seeking further information. As a result, we do not find the agent's reply so unreasonable as to be an unfair competitive tactic.

Copying of Foremost brochures

The ALJ found that the lay-out and color scheme for each of Qantas' 1974 brochures substantially matched those

of the previous year's Royal Road tours.[24] The Qantas brochures, however, prominently displayed Qantas' name and made no reference to Royal Road tours.[25] The covers of the carrier's brochures also bore a picture of a koala bear, while Foremost's brochures had used pictures of an automobile and car keys on the cover. I.D., p. 43.

The ALJ saw nothing in the record to indicate that anyone was confused by the similarity in the brochures or that Qantas had intended to pass-off its tour program as the Royal Road tour program. He also found no basis for Foremost's claim that the format, lay-out and colors of its brochures had acquired a secondary meaning identifying the product as Foremost's program.

Foremost makes a variety of attacks on the ALJ's reasoning. Essentially, however, it challenges the ALJ's reliance on the absence in the record of evidence of actual confusion. According to Foremost, a finding of unlawful deception is established because the record shows sufficient similarity between Qantas' brochures and Foremost's to create a likelihood of confusion. Pet., pp. 31, 33. The short answer is that on the basis of our review of the record, we find that the Qantas brochures so clearly identified Qantas as the operator of its tours that there is no reasonable likelihood that the public would be led to believe

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[24] The similarity in color refers to Qantas' duplication of Foremost's use of warm colors for its Australian brochures and cool colors for the New Zealand brochures. Foremost does not claim that one particular color scheme was used as its own corporate trademark.

[25] The Foremost brochures had used Qantas' name because Qantas was then a sponsoring carrier for the Royal Road tours. Qantas, moreover, had paid the promotional expenses for the tour program and bought the brochures. Tr. 278; I.D. 5.

that Qantas was selling Foremost's Royal Road program.[26] Furthermore, Foremost's assertion of the likelihood of confusion assumes that the public identifies a tour program with the tour operator. But the only relevant evidence demonstrated the opposite, for a Bureau witness testified (Tr. 724-725):

> "I might say here that I never had a passenger in all the years that I had been a ticketing agent, request a Royal Road or Foremost tour.
>
> "Most people came in and asked for a Qantas Fly-Drive, all assuming that all of our tours belonged to Qantas, and not to any particular wholesaler or agent."

Thus the record suggests that the public had identified Royal Road tours with Qantas, not Foremost.

In view of these facts, we find no likelihood of confusion. We also note that the evidence showed that the brochures' similarity in layout was beneficial, since it made it easier for travel agents and the public to compare the features of Qantas' program with those of Foremost's program. Tr. 769-770.

Bureau's Petition for Review

The Bureau asserts that this proceeding raises an important question of whether an air carrier's inclusive tour operations are permissible when they are designed to eliminate independent tour wholesalers from the tour wholesaling business. We find no basis for this assertion.[27] The

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[26] The Bureau's witness, for example, admitted that the covers of the Qantas brochures were in no way similar to the Foremost brochures. Tr. 769.

[27] The Bureau's challenge to the ALJ's dismissal of most of the complaint's allegations of unlawful conduct tracks the challenges

Bureau is essentially arguing that Qantas' conduct represented an effort to monopolize the market, rather than vigorous competition.[28] The argument is grounded initially on the assertion that Qantas' conduct was otherwise unlawful—an assertion which we have found unpersuasive. Secondly, the prerequisites to a finding of an attempt to monopolize are findings of a specific intent to monopolize and a dangerous probability that the attempt may be successful. *Yoder Bros.* v. *California-Florida Plant Corp.*, 537 F.2d 1347, 1368 (C.A. 5, 1976), *cert. denied*, 429 U.S. 1094; *U.S.* v. *Empire Gas Corp.*, 537 F.2d 296, 298-299 (C.A. 8, 1976), *cert. denied*, 429 U.S. 1122; Section of Antitrust Law, American Bar Ass'n, *Antitrust Law Developments* (1975 ed.), pp. 60-61.[29] In our view, the record would not permit us to make either of these findings.

Initially, we see no showing of a specific intent by Qantas to exclude competition and thus achieve monopoly power.

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made by Foremost, which we have rejected. Other assertions by the Bureau of anticompetitive and unlawful conduct by Qantas are not before us. The ALJ concluded that these assertions by the Bureau were outside the charges in the complaint and thus could not be considered in this proceeding, or were matters without public significance and thus not properly before the Board. See, *e.g.*, I.D., p. 40. The Bureau has made no attempt to explain why the ALJ's rulings on these charges were incorrect. Foremost, moreover, has not asked us to consider them. Accordingly, we will not take review of those rulings by the ALJ.

[28] While Foremost's original complaint contained allegations that Qantas' pricing and refusal to block space constituted an attempt to monopolize, Foremost's petition for review contains only the charges listed on p. 3, *supra*. The Bureau, moreover, did not argue at the hearing that Qantas was trying to drive Foremost from the market.

[29] The Ninth Circuit, however, requires only proof of a specific intent to monopolize, *e.g.*, *Knutson* v. *Daily Review*, 548 F.2d 795, 813-815 (C.A. 9, 1976), *cert. denied*, 433 U.S. 910. Since we find no evidence of such specific intent, this difference among the circuits may be ignored by us.

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We recognize that the specific intent may be inferred from proof of predatory or illegal conduct, *Hallmark Industry* v. *Reynolds Metals*, 489 F.2d 8, 12 (C.A. 9, 1973), *cert. denied*, 417 U.S. 432, although such conduct may not be conclusive proof of an intent to monopolize. *Knutson* v. *Daily Review*, 548 F.2d 795, 815 (C.A. 9, 1976), *cert. denied*, 433 U.S. 910.[30] The Bureau contends we should infer from Qantas' conduct that it had an intent to drive out competition. Our conclusion, however, that Qantas' conduct was not otherwise unlawful undermines the force of this contention. *Cf. Knutson* v. *Daily Review*, *supra*, 548 F.2d at 814. The record indicates, moreover, that Qantas was apparently motivated only by its need to compete effectively in the South Pacific tour market. Thus, for example, the pricing of its in-house tours was both consistent with Foremost's own arrangement with Air New Zealand (*supra*, p. 6, n.12) and compelled by its need to match its competitors' offerings of tours priced at the minimum prices permitted by IATA (Tr. 1120, 1150-1151, 1198-1199, 1399-1400). Similarly, even Qantas' treatment of Foremost's blocked-space requests did not necessarily result from any intent to exclude competition. As Foremost's witness explained, air carriers are willing to block space in the Christmas season for discount-fare tour participants, even though their seats could be filled with full-fare passengers, because they can count on the tour operators providing them business during the remainder of the year, when the carriers have excess capacity (Tr. 579,

[30] Nothing in the record directly shows that Qantas had an intent to monopolize. *Compare U.S.* v. *Empire Gas Corp.*, 537 F.2d 296 (C.A. 8, 1976), *cert. denied*, 429 U.S. 1122, where there was direct evidence of the defendant's intent to exclude competition and fix prices.

582). Since Foremost could perhaps be expected to provide little continuing business for Qantas because of its preference for Air New Zealand (*supra*, p. 10, n.20), Qantas would presumably prefer to limit Foremost's blocked space in favor of its full-fare passengers, its in-house tour operation, and tour operators more likely to provide continuing business for Qantas. While as indicated above we believe such a preference may be unlawful, it does not prove that Qantas was trying to exclude Foremost from the market. Furthermore, we are reluctant to infer a monopolistic intent from Qantas' conduct in view of its willingness to use independent tour wholesalers (Tr. 1202-3, 1429). In conclusion, therefore, we are unable to find that Qantas' conduct was necessarily intended to create a monopoly.

The Bureau has also presented no evidence which would suggest that Qantas' conduct created even a significant possibility of monopolization. Our review of the record suggests that in fact Qantas was not likely to obtain monopoly power. First, it is only one of the three IATA carriers providing scheduled service between the United States and the South Pacific. Each of the other IATA carriers may sponsor its own inclusive tour programs in competition with Qantas, and has done so. In addition, the Bureau cites no evidence that Qantas' market share is already so large that the carrier could realistically obtain monopoly power.[21] Furthermore, Foremost has, of course, survived and is still providing tours under the sponsorship of Air New Zealand. Finally, the apparent basis for Qan-

[21] The Bureau does not contend that the carrier already has monopoly power. If it had, it would have had to have shown that Qantas' share of the relevant market made it a monopoly. *H&B Equipment Co.* v. *International Harvester*, 511 F.2d 239, 242-243 (C.A. 5, 1978).

tas' conduct, as discussed above, was its desire to compete effectively in the market rather than to dominate it. Thus it apears unlikely to have created a serious risk of monopolization.[32]

The Board, as shown above, has refused to view in-house inclusive tours by air carriers as inconsistent with the public interest. For reasons already indicated, there is no basis in this record for concluding that Qantas engaged in conduct to put independent tour wholesalers out of business in the South Pacific.

ACCORDINGLY, IT IS ORDERED:

1. That the petitions of the Bureau of Enforcement and Foremost International Tours for discretionary review are granted;

2. That the initial decision is affirmed as modified herein.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

All Members concurred.

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[32] In addition, the recognized dislike of many travel agents for airline in-house tour operations (Tr. 1019-1020) and Foremost's past ability to obtain preferential agreements with the suppliers of some land arrangements (Ex. F-33, p. 280) suggest that there was little likelihood of monopolization by Qantas.

Appendix A

APPENDIX

DOCKET 27631

THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION REFERRED TO HEREIN IS NOT ATTACHED TO THIS COPY BECAUSE OF THE WIDE CIRCULATION GIVEN AT THE TIME OF ITS RELEASE.* THE INITIAL DECISION IS ATTACHED TO THE ORIGINAL OF THE BOARD'S OPINION AND TO THE OFFICIAL COPIES IN THE BOARD'S FILES AND MAY BE EXAMINED THERE. IT WILL ALSO BE PRINTED AS PART OF THE OFFICIAL "CIVIL AERONAUTICS BOARD REPORTS."

* Served: March 15, 1978.

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 26, 1979

CONDON & FORSYTH
RECEIVED
MAR 29 1979

George N. Tompkins, Jr., Esquire
1251 Avenue of the Americas
New York, New York 10020

Re: Qantas Airways Limited v. Foremost International Tours, Inc., A-829

Dear Mr. Tompkins:

Your application for stay in the above-entitled case has been presented to Mr. Justice Rehnquist, who has endorsed thereon the following:

"3/24/79

Denied. Mandamus is not a substitute for appeal, and an order denying partial summary judgment is not appealable unless certified pursuant to 28 U.S.C. 1292(b) WHR"

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ PATRICIA A. DEAN
Patricia A. Dean
Assistant Clerk

Appendix B

th

cc: Alexander Anolik, Esquire
693 Sutter Street
San Francisco, California 94109

Melvin Shinn, Esquire
33 S. King Street
Suite 223
Honolulu, Hawaii 96813

Richard J. Torre, Esquire
Atkinson-Nichols Landmark Bldg.
1032 Broadway
San Francisco, California 94133

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

No. CV 74-116-JWC

FOREMOST INTERNATIONAL TOURS, INC.,
Plaintiff,

v.

QANTAS AIRWAYS LIMITED, et al.,
Defendants.

MEMORANDUM AND ORDER

In this antitrust action both parties have moved for summary judgment on Count One of the complaint which charges the defendant with violation of Section 2 of the Sherman Antitrust Act (Title 15 U.S.C.A. § 2). Specifically, this count alleges that the defendant has engaged in predatory conduct which has seriously damaged plaintiff's business.

The defendant Foremost is engaged in the business of packaging, producing, and operating inclusive tours consisting of air transportation to Australia and New Zealand from the United States, Canada, and elsewhere, and land transportation including hotels, sightseeing, car rentals, and other accommodations.

The defendant Qantas is a public company incorporated under the laws of Queensland, Australia, which prior to March 31, 1974 had been supplying the air portion of certain of these tours under an agreement which expired March 31, 1974. Prior to its expiration date Qantas notified Foremost that the agreement would not be renewed. After

its expiration, Qantas undertook to package, produce, and operate its own inclusive tours remarkably similar to those in which Qantas and Foremost had previously participated.

During the early stages of this action, the court issued a preliminary injunction enjoining the defendant from engaging in certain specific practices.

At the same time, the court was confronted with a motion for summary judgment by the defendant Qantas. In dealing with this motion, the court observed that Qantas was within the jurisdiction of the Civil Aeronautics Board under the provisions of the Federal Aviation Act, Title 49 U.S.C. § 1301, *et seq.*, and therefore the CAB had authority to investigate most of the issues raised by the motion for summary judgment. Accordingly, it remanded the case to the CAB for hearing on the issues raised in the complaint, reserving nevertheless jurisdiction over the alleged antitrust violations. This order was affirmed on appeal, *Foremost Intern. Tours* v. *Qantas Airways Ltd.*, 525 F.2d 281 (9th Cir. 1975).

After a full adversary hearing before an administrative law judge acting for the Board, certain findings of fact were made from which the administrative law judge concluded that no anticompetitive practice was shown. On administrative appeal this order was affirmed. With the case in this posture, both parties have moved for summary judgment.

Plaintiff's motion can be rather summarily dismissed. Foremost contends that the undisputed facts together with certain inferences which can be drawn therefrom, establish a classic case of antitrust activity as a matter of law. However, drawing inferences must be left to the finder of fact. This being so, summary judgment for the plaintiff would be inappropriate and its motion therefore is denied.

Appendix C

The defendant's motion for summary judgment is more complex. The defendant contends that by remand the CAB was given authority to make a final disposition of all issues raised in Count One of the complaint, and that the decisions of the CAB should be given *res judicata* effect. With this contention, I cannot agree. The case was referred to the CAB only as to those issues which were in the Board's power to decide.

The CAB derives its jurisdiction from the Federal Aviation Act, which creates a comprehensive system of regulation over the air transportation industry; within this industry lies the regulatory province of the Board. Thus, the CAB took jurisdiction of the instant suit to determine whether Qantas had conformed to those regulatory provisions which must of necessity, relate directly to activities confined to the air transportation industry. As to these practices, the decision of the Board should and will be given *res judicata* effect for the purposes of this litigation.

However, there remain issues in the suit over which the Board did not and indeed could not exercise regulatory jurisdiction. This is so because the conduct of Qantas which gives rise to the complaint of antitrust violations resulted from the entrance of the airline into a separate and distinct sphere of economic endeavor, *i.e.*, the land tour business, over which the CAB exercises no regulatory control.

The question here at issue is essentially one of overlapping jurisdiction, which for purposes of analysis, may be viewed as a continuum. At one end lies the sole jurisdiction of the Board, pursuant to its statutory grant of authority under the F.A.A. Within this area the CAB is empowered to make determinations which bind the court in the instant case. (For example, a finding by the Board

that Qantas conformed to tariffs set by that body could not be properly relitigated in this court.)

At the other end of this continuum, lies the exclusive antitrust jurisdiction of the district court, wherein the CAB may make no findings which bind the court as to the propriety of certain activities under the Sherman Act, where such activities were undertaken by an airline in an industry which the CAB does not have the power to regulate. For example, the Board, while adjudicating a question of anticompetitive behavior on the part of an airline, which is proscribed by Section 411 of its own regulations, 49 U.S.C. § 1381, could not also find that conduct undertaken outside of the regulatory sphere, was done with no intent to monopolize under the Sherman Act, for such a finding would invade this court's antitrust jurisdiction.

Between these two fairly well defined jurisdictional zones lies an area of overlapping or concurrent jurisdiction wherein lie the most difficult and perplexing problems in the case. In determining whether the airline had conformed to the provisions of the F.A.A., the Board undertook an examination of both practices within the industry which it regulated, and the conduct of Qantas' land tour operation over which it has no jurisdiction. The court properly retained jurisdiction over the antitrust questions involving the tour operation and now must assess which of the findings in this grey area of concurrent interest to both the CAB and the court, are to be given *res judicata* effect in the litigation. The defendant has urged that full *res judicata* effect be given to all findings of the CAB which bear on the question of liability under the Sherman Act in the instant action. Thus, the defendant would have the court adopt the findings of the Board which were made, pursuant to their authority over practices within the regulated industry, but which exculpated the defendant from antitrust

liability, by implication, for conduct which was undertaken in the unregulated business of providing land tours. This, the court declines to do, for to permit the CAB to bind the parties as to the Sherman Act claims relating to predatory conduct in the unregulated business here at issue would be to grant to the Board the power to bestow antitrust immunity as to practices over which it lacks regulatory control. As the ...th Circuit noted, in affirming the continuing jurisdiction of this court, notwithstanding the reference of certain issues in the case to the CAB:

> "Here we have Qantas, a firm engaged in a regulated industry, entering the tour industry, which is not *per se* regulated by the CAB, and its entry into this industry is alleged to have had an anticompetitive effect on the non-CAB-regulated tour industry. In this case, while the CAB has authority over Qantas, and arguably has the means to enforce an order against Qantas should it so choose, in lacking authority over all the parties, it cannot make the accommodations and effect the compromises which are the hallmark of agency regulation. It may well lack the means to deal with the total problem. But more importantly, the regulatory agency here also lacks the *expertise* and the *incentive* (—after all it is not its industry—) to act on an inter-industry problem. There is the danger that in cases such as this the regulatory agency might favor its own regulated industry at the expense of non-regulated commerce, or at the very least, might consider the resolution of such matters to be of a less pressing priority."

* * * * *

Appendix C

"For instance, we do not think it would be seriously contended that the CAB could by its approval of a merger between an airline and a hotel chain, or by the memorialization of a resolution allowing airlines to go into the hotel business, legally permit an airline to monopolize the hotel business with impunity; nor if several airlines went into the hotel business, approve their dividing up of territories, or fixing prices in the hotel business. Neither do we think the CAB's approval of IATA Resolution 810 D & E permitting airlines to go into the tour business immunizes Qantas for an attempt (if proven) to monopolize the tour business over which the CAB in general has no control. The scope of the antitrust immunity which an agency's approval can confer under statutes such as 49 U.S.C. § 1384 was intended to be, and is, no broader than the industry regulated. *Butler Aviation Co.* v. *CAB*, 389 F.2d 517, 521 (2d Cir. 1968). A regulatory agency's approval of certain actions cannot confer antitrust immunity to those actions unless the primary anticompetitive effect those actions may have is limited to the industry in question." *Foremost Intern. Tours* v. *Qantas Airways Ltd.*, 525 F.2d 281, 285-86 (9th Cir. 1975).

I read the opinion of the Ninth Circuit as permitting the court to draw on the expertise of the Board pursuant to its evaluation of those practices which relate primarily to the regulated industry. However, the court retains jurisdiction over the antitrust questions involving the tour operation and is in no way bound by the findings of the CAB in this regard.

"The court has the last word, but it can properly seek the benefit of whatever contributions can be made by

> an agency whose 'area of specialization' embraces problems similar to or intermeshed with those presented to the court. 3 K. Davis, Administrative Law Treatise § 19.09 at 53 (1958)." 525 F.2d 281 at 287.

The court has carefully examined the findings embodied in the initial decision of Judge Argerakis, the review of this initial decision by the Board and those specific findings which the defendant has, in its instant motion, urged this court to adopt and thereby estop the plaintiff from relitigating. In some instances the findings are clearly within the Board's power to make and must therefore be adopted by this court. In addition, there are findings which, though in the grey area of concurrent jurisdiction, are clear and instructive to the court as to the nature of the evidence adduced and the method of analysis applied to same in order to arrive at the conclusion reached. These the court also chooses to accept as *res judicata* for purposes of the instant case.

However, the opinions of the CAB contain certain findings as to the anticompetitive effect of practices of Qantas in its land tour operation which this court is in no way obligated to accept for the reasons stated above. Moreover, the method of analysis which the CAB undertakes in order to determine whether a specific practice is violative of its regulations is not necessarily consistent with the analytical devices which this court must employ in testing these same practices under Sherman Act standards. For example, where an allegation of predatory pricing is involved, the Ninth Circuit has adopted the Areeda-Turner test which requires an examination of the fixed versus variable costs to the producer in providing a specific service or product. *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1975); Areeda & Turner,

Appendix C

Predatory Pricing and Related Practices under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 727 (1975).

It is unclear from the opinions of the CAB whether the Board undertook a similar inquiry in evaluating the cost/price structure at issue here as regards the land components of the tours offered by Qantas. Therefore, in order to provide the plaintiff an opportunity to have a full hearing in this court under the appropriate principles of antitrust law, the court must permit testimony and evidence to be produced regarding this issue.

Numerous other questions, in some instances arguably resolved in part by the CAB, will thus have to be relitigated here in order to afford the plaintiff its due process rights as regards claims under the Sherman Act relating to antitrust activity in the unregulated business at issue.

For the foregoing reasons, the court will accept as *res judicata*, for purposes of this litigation, the following facts and conclusions as found by the CAB.

1. The mere fact that Qantas conducted an in-house tour operation did not, in itself, constitute a violation of the provisions of the Federal Aviation Act or the Sherman Act.

2. Qantas used the proper exchange rate of $1.00 (A) = $1.485 (U.S.) for conversion of U. S. dollars into Australian dollars in the pricing of the land portion of Qantas inclusive tours.

3. The airfare prices charged by Qantas in connection with the tours at issue conformed to the tariffs as set by the CAB and were not violative of Section 403(b) of the Federal Aviation Act.

4. In conducting its in-house tour operation, Qantas engaged in no practices as proscribed by Section 411 of the

Federal Aviation Act, other than those violations stemming from the printing and distributing of tour brochures which contained misrepresentations of fact regarding the tours advertised.

Thus, there remain in issue questions involving the below cost pricing of the land portion of the tours, and the extent to which these costs as well as the indirect administrative expenses of the tours under Sherman Act analysis were properly recovered from the airfares charged, notwithstanding the fact that the fares conformed to the CAB tariffs. In addition, there remain to be determined similar questions of fact, for example alleged "bait and switch" tactics by Qantas, its misappropriation of the plaintiff's tour business, misrepresentations on the brochures advertising Qantas' tours and the extent to which such brochures so closely copied the plaintiff's as to mislead the public into believing the two tours were provided by the same entity. As discussed above, all of these questions and others remain in suit because they are relevant as to a predatory intent by Qantas in connection with an alleged attempt to monopolize the land portion of the tours at issue. As discussed above, these issues which address alleged Sherman Act violations occurring outside the regulatory sphere of the CAB could not be properly resolved by that body and therefore must be tried in this court.

DATED: April 6, 1979

/s/ JESSE W. CURTIS
JESSE W. CURTIS
United States District Judge

Petitioner's Reply Brief

Office-Supreme Court, U.S.
FILED
OCT 2 1981
ALEXANDER L. STEVAS

No. 81-426

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FOREMOST INTERNATIONAL TOURS, INC.,
Petitioner,

v.

QANTAS AIRWAYS LIMITED
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

ALEXANDER ANOLIK, ESQ.
Counsel for Petitioner
Foremost International Tours, Inc.
693 Sutter Street, Sixth Floor
San Francisco, California 94102
(415) 673-3333

Of Counsel:

MITCHELL BLUMENTHAL, ESQ.

ACME LEGAL • 1229 WAIMANU ST. • HONOLULU, HAWAII 96814

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

Petitioner, FOREMOST INTERNATIONAL TOURS, INC. (hereinafter FOREMOST), submits this Reply Brief, pursuant to Supreme Court Rule 22.5, in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

I. This Brief is submitted because Respondent, in its purported discussion of issues relevant to the Ques-

tion Presented, as framed by Petitioner, has failed to properly address the issues heard below, by both the District Court of Hawaii and the Ninth Circuit Court of Appeals, respectively.

Respondent erroneously asserts that the question as presented by the Petition does not derive from the proceedings in the courts below. (Respondent's Brief in Opposition, p. i.) However, Respondent then asserts that the Petition does not set forth any statement of the case containing the facts material to the consideration of the facts presented by the Petition. (Respondent's Brief in Opposition, p. 2.) Petitioner asserts that Respondent has skirted the issues framed by Petitioner in its response, and that Respondent has placed factual allegations concerning the prior proceedings in issue, when the Petition itself clearly states that such prior proceeding are not in issue before this Court. (Petition, p. 1.)

II. Respondent's lengthy discussion of the primary jurisdiction issues surrounding the initial complaint of Petitioner in 1974 is not relevant to this proceeding, and the primary jurisdiction issues were not addressed by Petitioner, as discussed above. These issues, it should be noted, were decided adversely to Respondent, this Court ultimately denying certiorari in 1976, *Foremost International Tours, Inc.* v. *Qantas Airways Limited*, 429 U.S. 816 (1976). In addition, the language cited by Respondent at pages six through seven of its Brief in Opposition, quoting the District Court's Order of April 6, 1979, *Foremost International Tours, Inc.* v. *Qantas Airways, Limited*, 478 F.Supp 589 (D. Hawaii 1979) is beneficial to the arguments raised by Petitioner. Respondent has stated that the question pre-

sented by Petitioner does not derive from the proceedings below (Respondent's Brief p. i.), yet goes on to detail for this Court the precise type of predatory conduct as alleged by Petitioner throughout the history of this case, expansively brought to this Court's attention in the Petition.

Respondent then goes on to mistakenly assert that, had it been a recipient of antitrust immunity, the trial would not have taken place. (Brief in Opposition, p. 9.) However, Respondent confuses the issue inherent in this litigation. Petitioner has not asserted that Respondent's wholesale tour operation is or was benefitted by an antitrust exemption; rather, Petitioner constantly referred to this market as an "independent" and an "unregulated" one. Nevertheless, the antitrust issues remain germane to the arguments raised below, since QANTAS AIRWAYS LIMITED (hereinafter QANTAS) operates in this country pursuant to Section 402 of the Federal Aviation Act of 1958 (hereinafter the Act, 49 U.S.C.A. 1301 *et seq.*), and its operations are scrutinized pursuant to Section 412 of the Act. Petitioner has detailed for this Court the manner in which agreements filed with the Civil Aeronautics Board may receive antitrust immunity pursuant to Section 414 of the Act in its Petition, and the need to repeat this administrative procedure is not warranted in a Reply Brief. (Petition, pages 9-25, Supreme Court Rule 22.5)

III. The Civil Aeronautics Board, under Section 411 of the Act, may issue a cease and desist order once a finding of anticompetitive practices is made. Unlike the misnomer "textbook accommodation" between administrative laws and the antitrust laws referred to by

Respondent, no such accommodation exists under the Act. While the Board may issue, and in this case did, a cease and desist order, it is not empowered to award damages. Any remedies leading to an award of either compensatory and/or punitive damages must be sought in a court of law by a prospective claimant, such as the course of conduct which Petitioner has taken since the outset of this litigation in 1974.

Therefore, the issue, as properly stated by Petitioner, is whether or not a highly regulated entity, such as an airline of the same mettle as QANTAS, may use its guaranteed route structure and set revenues, which possess antitrust immunity, to enter an unregulated, independent tour wholesale market, and price package tours below cost to drive competitors out of the relevant market. Rather than respond to this issue, the Brief in Opposition promulgated by Respondent simply ignores it.

IV. Moreover, Respondent asserts that the "antitrust court" refused to confer antitrust immunity on the airline, when, in fact, only the Board, pursuant to Congressional mandate, may do so. (Brief in Opposition, p. 9.) This precise course of action is clearly stated in Section 414 of the Act. Petitioner has shown the manner in which Respondent entered the unregulated sphere of competition which comprises the tour wholesale market, carrying with it full antitrust immunity within its airline activities. The premise put forth by Respondent that "no antitrust immunity was granted . . . in any respect" is without merit. In addition, Petitioner has shown that even a Congressional grant of immunity from the operation of the antitrust laws is not all-encompassing. (Petition, pages 2-9.)

Lastly, the premise that the Petition does not allege sufficient error below, as advanced by Respondent, is incorrect. Moreover, it should be noted that Petitioner's Motion for Disposition by Opinion was denied by the Ninth Circuit on May 19, 1981. Petitioner has stated a) that the Ninth Circuit did not follow its own prior rulings in this case (Petition, page 25-29; b) that incorrect principles of antitrust mechanisms were applied below (Petition, pages 9-25); and c) that even regulated conduct operating under an antitrust exemption may still be challenged as illegal (Petition, pages 2-9). The conflict among the circuits regarding the issues raised by Petitioner is a consideration which the Rules of this Court permit to be taken under advisement when a Petition for Certiorari is pending. (Petition, pages 25-29.) Respondent, in this action, has appeared before this Court on two separate occasions. This Court denied certiorari to Respondent in 1976 (429 U.S. 816), and Mr. Justice Rehnquist denied a Petition for Writ of Mandamus in 1979 (Brief in Opposition, pages 26a-27a.) Clearly, contrary to Respondent's belief, this case does in fact present issues which are "substantial, significant, [and] important enough" to warrant review by this Court.

CONCLUSION

For the reason hereinabove stated, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, as prayed for herein.

ALEXANDER ANOLIK, ESQ.
ALEXANDER ANOLIK,
A Professional Law Corporation
Counsel for Petitioner
Foremost International Tours, Inc.
693 Sutter Street,
Sixth Floor
San Francisco, CA 94102
(415) 673-3333

Dated: September 28, 1981
San Francisco, California

Of Counsel,
Mitchell Blumenthal, Esq.

PROOF OF SERVICE

I, the undersigned, declare that I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within entitled cause; my business address is 693 Sutter Street, Sixth Floor, San Francisco, California 94102.

On September 28, 1981, I served the attached Reply Brief of Petition on the parties involved in said cause, by placing three copies thereof enclosed in a sealed envelope with postage thereon fully paid, in the United States mail at San Francisco, California, addressed as follows:

George N. Tompkins, Esq.
Condon & Forsyth
1251 Avenue of the Americas
New York, New York 10020

Mukai, Ichiki, Raffeto & MacMillan
Suite 800
The Queen Street Building
345 Queen Street
Honolulu, Hawaii 96813

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28h day of September, 1981, at San Francisco, California.

(signature)

.....

Lori A. Laskowski